

Notice of Decision and Reasons for Decision

Applicant:	'AG6'
Agency:	Merit Protection Boards
Decision Date:	10 July 2019
Exemptions considered:	Section 25A(1)
Citation:	'AG6' and Merit Protection Boards (<i>Freedom of Information</i>) [2019] VICmr 60 (10 July 2019)

FREEDOM OF INFORMATION – substantial and unreasonable diversion of resources

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 decision 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.

Sven Bluemmel
Information Commissioner

10 July 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency, the Merit Protection Board (MPB), for access to the following documents:
 1. The DAB [Disciplinary Appeals Board] audio recordings of [Applicant] [year] DAB hearing
 2. All documents held by the MPB related to [Applicant]
2. By letter dated 2 May 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 removing the proposed ground of refusal by refining the scope of the request.
4. The Applicant did not refine the scope of the request.
5. In its decision letter of 17 May 2019, the Agency advised the Applicant it had determined to refuse the request under section 25A(1).

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) correspondence between the Agency and the Applicant leading up to the Agency's decision;
 - (c) the Agency's submission dated 14 June 2019; and
 - (d) the Applicant's request for review and correspondence dated 21 June 2019.
9. 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 application of section 25A(1)

10. Section 25A provides:

25A Requests may be refused in certain cases

- (1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request—

- (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations;

...

- (2) Subject to subsection (3) but without limiting the matters to which the agency or Minister may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency or Minister is to have regard to the resources that would have to be used—

- (a) in identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister; or
- (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used—
 - (i) in examining the documents; or
 - (ii) in consulting with any person or body in relation to the request; or
- (c) in making a copy, or an edited copy, of the documents; or
- (d) in notifying any interim or final decision on the request.

- (3) The agency or Minister is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.

...

- 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):

...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 spent to process the request. To require the issue be determined with absolute certainty would compel the agency to undertake the very work 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

¹ [2001] VSCA 246 at [48].

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

³ *Ibid* at [11].

14. I am required to consider whether section 25A(1) applies at the time of review. That is, I must assess whether processing the FOI request *now* would substantially and unreasonably divert the Agency's resources from its other operations under section 25A(1), rather than when the Agency made its decision to refuse to process the request.⁴

Consultation with the Applicant

15. Section 25A(6) provides:

An agency or Minister must not refuse to grant access to a document under subsection (1) unless the agency or Minister has—

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

16. I have reviewed the Agency's notice of intention to refuse access dated 2 May 2019, and email correspondence between the Agency and the Applicant regarding the scope of the request prior to the Agency's final decision.
17. I am satisfied the Agency provided the Applicant with a reasonable opportunity to consult, and provided sufficient information to assist the Applicant in making the request in a form that would remove the proposed grounds for refusal.
18. 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. In this case, the Applicant has determined not to narrow the scope of their FOI request.

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

19. The words 'substantially' and 'unreasonably' have not been precisely defined in section 25A. In *McIntosh v Police*,⁵ VCAT stated:

... essentially I take these words not to require overwhelming proof of difficulty, and to allow some latitude to the Respondent, given that the difficulty of the process can only be estimated, not proven.

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

⁵ (Vic) [2008] VCAT 916 at [21].

20. VCAT went on to observe while precision is not required, the respondent in that case had not ‘grappled with the question of what time and resources would reasonably be involved’,⁶ concluding there was ‘no credible evidence of a large or unreasonable workload being generated by the request’.⁷
21. In the present case, the Agency submits:
- (a) it is a small agency, comprising a total of five employees;
 - (b) the five employees are also responsible for managing two other agencies;
 - (c) the Agency has no designated FOI officers;
 - (d) the Agency’s preliminary search identified over 2,000 pages relevant to the terms of the Applicant’s request, covering the time period [date range] – this is not an exhaustive list of documents that would have been identified if the Agency had agreed to process the request;
 - (e) it is estimated it would take an Agency officer approximately 20 days to process 2,000 pages;
 - (f) further searches would need to occur to process the request, including:
 - (i) email accounts of four current Agency staff;
 - (ii) email accounts of former Agency staff members;
 - (iii) desktop computers and laptops used by Agency staff when working on matters involving the Applicant; and
 - (iv) the Agency ‘share drive’.
 - (g) restoring email accounts for former Agency staff members is a time consuming and arduous process.
22. On the information before me, I accept the effort required for the Agency to process the FOI request would involve a substantial diversion of the Agency’s resources.
23. 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*.⁸
24. 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 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 Agency to locate the documents sought by 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 examine and, if necessary, consult upon those documents.

⁶ Ibid, at [29].

⁷ Ibid, at [26].

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

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

I consider members of the public should have access to official records, unless there is a compelling reason to deny access.

I acknowledge the Applicant holds 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 documents in this instance.

I also consider the Applicant can make a new request for access to the documents [they are] seeking with a reduced scope at any time. For example, the Applicant may limit the date range or specify a particular type of document.

(c) Whether the request is reasonably manageable

I accept the Agency comprises five officers in total, whose responsibilities are shared across a further two agencies, and there are no designated FOI officers employed by the Agency.

Based on the information before me, I do not consider the Applicant's FOI request to be reasonably manageable in the context of the Agency's limited resources and the current scope of the request.

(d) The reasonableness 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 Agency's decision. I am satisfied the Agency responded reasonably to the Applicant's request, including providing the Applicant with:

- (a) a detailed explanation of the work involved in processing the request;
- (b) reasonable opportunities to revise the scope of the request; and
- (c) suggested reductions that would allow the Agency to process the request.

I note the Applicant's submission that the Agency did not provide the precise date the audio recordings were destroyed, resulting in the Applicant being unable to redraw the boundaries of [their] application.

I also note the Agency informed the Applicant that audio recordings relevant to the request were destroyed 'at the conclusion of the hearing'.

I do not consider the Agency's refusal to provide the Applicant with the precise date of destruction impaired the Applicant's ability to remove the grounds for refusal under section 25A(1). I consider the Applicant to have been uncooperative in redrawing the boundaries of the application.

(e) The statutory time limit for making a decision

Due to the work required to process the request and the limited resources available to the Agency, 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 that processing the request would likely interfere with the other operations of the Agency.

I acknowledge it is open to an Agency and Applicant where appropriate, to negotiate an extension of time to make a decision. Where possible, this may assist in making a request reasonable to process.

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

Conclusion

26. 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

27. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁹
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
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.¹²

When this decision takes effect

32. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).