

Notice of Decision and Reasons for Decision

Applicant:	'AG8'
Agency:	Victoria Police
Decision Date:	12 July 2019
Provision considered:	Section 25(A)(1)
Citation:	'AG8' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 62 (12 July 2019)

FREEDOM OF INFORMATION – Law Enforcement Assistance Program (LEAP) audit – substantial and unreasonable diversion of Agency resources 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.

Sven Bluemmel
Information Commissioner

12 July 2019

Reasons for Decision

Background to review

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

...a list of every occurrence that my name (or personal details) have been searched and/or accessed on any and all databases held by Victoria Police (LEAP, etc). Specifically, I request the date, time, and name of personnel involved in all such searches and accesses.
2. By letter dated 8 March 2019, the Agency wrote to the Applicant advising it had interpreted the request to be for a Law Enforcement Assistance Program (**LEAP**) audit. The Agency stated it intended to deny access to the documents under section 25(A)(1) as it considered the work involved in the 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. The Agency recommended that Applicant limit the scope of their request to no greater than six months and provided other information on the LEAP audit process and considerations (refer paragraph 18).
4. In response, the Applicant clarified their request to be for access to 'all LEAP access details concerning myself' for the period including [date range spanning over five years]; highlighting they believed the suggested six month time period was 'too restrictive and inadequate'.
5. In its decision, the Agency advised that consultation had not resulted in a narrowing of the scope of the request and determined to refuse to process the request, pursuant to the provisions of section 25A(1) of the FOI Act.

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) the Applicant's original request and review application;
 - (c) correspondence between the Agency and the Applicant leading up to its decision;
 - (d) the Agency's submissions during the course of the review;
 - (e) advice from the Agency on internal LEAP audit consultation standard operating procedures; and
 - (f) correspondence from the Applicant to OVIC during the course of the review.

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.

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

10. Section 25A(1) provides that a request may be refused by an agency in certain circumstances after 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 its 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. Once an agency decides to refuse to grant access to a request under section 25A(1), the Agency 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.²
13. 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 the Agency's resources from its other operations under section 25A(1), rather than when the Agency decided to refuse to process the request.³

Consultation under section 25A(6)

14. A decision to refuse to process a request under section 25A(1) cannot be made unless an agency provides notice to an 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, provides information to assist the applicant in amending their request to a form that would remove the proposed ground for refusal.⁴
15. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access, provided 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 ground for refusal. I note that the Applicant determined not to narrow the scope of their FOI request.
16. 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)

17. I have also considered the information provided by the Applicant regarding their motivation for seeking access to the information. I note the Applicant raised concerns that they had been the target of 'malicious' prosecutions and wanted to access the information in question to help 'clear their name'. The Applicant submitted the following:

My access to said information is critical to my defence and the conclusion of this abuse of process. Furthermore;

- the request relates to information held by a public office and concerns only myself. The request does not concern other parties.

¹ [2001] VSCA 246 at [48].

² Ibid at [11].

³ 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.

⁴ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

- the request may reveal corruption within a government department, and is therefore in everyone's interests.
- the request is not an unreasonable diversion of resources, given the resources already wasted on 2 frivolous prosecutions over 5 years.

18. I have considered the Agency's letter dated 8 March 2019, which advised the Applicant as follows:

'Conducting a LEAP audit is a complex and time consuming process undertaken by an audit specialist... Please consider the following when considering the period of time you would like an audit to the LEAP database to cover:

- Limit your request to include sworn employees of Victoria Police (i.e. police officers). In addition to police officers, the LEAP database is accessed regularly by unsworn employees (public servants) of Victoria Police, employed to perform administrative tasks... Each time administrative staff update a LEAP entry, a record is made that that person accessed that record. If you do not seek information about whether administrative staff accessed the LEAP record, limiting the scope of your request in this way can significantly reduce the volume of data needing to be assessed and the time taken to process your request.
- This office cannot answer questions as to why a person accessed a LEAP record. The role of the FOI officer is only to locate documents and assess them for release in accordance with the provisions of the Act including any applicable exemptions.
- Should your request be due to a belief a particular member of Victoria Police has illegitimately accessed your data; you may wish to give thought to addressing this issue to the Professional Standards Command [contact details provided].'

19. I have also considered the Agency submissions of 30 to 31 May 2019 which detailed that an initial audit revealed 130 Agency staff, being 35 unsworn staff and 95 sworn officers, had accessed the Applicant's LEAP record for the requested time period. The Agency further confirmed its previous advice to my office that its current internal policy was that consultation with all staff who accessed any LEAP record was required prior to any release of documents. In this case, the Agency submitted that the required consultation would involve separately contacting with all staff listed as accessing the Applicant's LEAP record, in this case 130 staff, to determine:

- (a) if release of the information would undermine an Agency investigation; and
- (b) if release of the personal information of the members or staff would be agreed to.

20. On the matter of consultation, my office has previously sought additional information from the Agency to confirm whether section 33(2C) had been considered prior to the application of section 25A(1) in relation to the amount of consultation with third parties required to process LEAP audit requests. Section 33(2C) provides:

... an agency is not required to notify a person if –

- (a) that notification would be reasonably likely to endanger the life or physical safety of that person, or cause that person undue distress, or is otherwise unreasonable in the circumstances; or
- (ab) the person to be notified is a primary person, and the notification would be reasonably likely to increase the risk to that person's safety from family violence; or
- (b) it is not practicable to do so.

21. Section 25A(2)(b)(ii) states that, in estimating whether an FOI request will involve an unreasonable diversion of resources, an agency can consider 'the resources that **would have** to be used in

consulting with any person or body in relation to the request'. The emphasised words indicate that, when relying on section 25A(1), any such consultation needs to be *likely*, rather than *potential*.

22. While on its face section 33(2B) provides that, in deciding whether disclosure of a document would involve unreasonable disclosure of personal affairs information, an agency must notify affected persons and seek their view about whether disclosure should occur. Section 33(2C) relieves that obligation to consult where it is 'not practicable'.
23. In deciding whether consultation is practicable under section 33(2C), a key factor would be the resources of the Agency to undertake consultation. It could potentially be argued that it is likely that not all the 130 Agency staff would need to be consulted as this amount of consultation may be deemed 'not practicable'. Thus, an agency would not be able to rely on the burden of consulting when deciding whether section 25A(1) applied as it would be unlikely that consultation that is practicable would result in an unreasonable diversion of resources.
24. In the current circumstances, I have considered the Agency's advice that the provisions under section 33(2B) are not relevant in determining consultation requirements for LEAP audits. I acknowledge the Agency's internal policy of the FOI Unit having to consult with **all** staff / officers identified in a LEAP audit report to:
 - (a) ensure disclosure of information would not undermine an investigation (and therefore that the record of access should potentially not be released for law enforcement reasons as envisaged by section 31(1)); and
 - (b) determine whether the individual officers had any safety concerns regarding the release of their personal information in accordance with section 33(1).
25. In my review of this matter I have sought to consider and address key questions below to determine whether the diversion of the Agency's resources would be both 'substantial' and 'unreasonable' in the circumstances.

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

26. When determining whether to refuse a request under section 25(A)(1), 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 to be determined with absolute certainty would compel the agency to undertake the very work that section 25A(1) is designed to avert.⁵
27. In line with this, while the Agency has not provided the Applicant or OVIC with an estimate of the time the required analysis and consultation would take, I accept the email and/or telephone contact with up to 130 Agency officers would require the dedication of significant time and resources by the FOI Unit.
28. I accept the Agency's FOI staff who are able to undertake the assessment of LEAP audit reports remains stable at approximately six to seven staff. At the time of this decision, the Agency has approximately 500 other FOI requests requiring processing.
29. I further accept the Agency's general policy that consultation would be required with all Agency staff who accessed the Applicant's LEAP record during the time period requested to ensure any potential law enforcement matters are not negatively impacted and also to provide third parties with an opportunity to raise any concerns about the potential release of their personal affairs information contained in the LEAP audit report to the Applicant.

⁵ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

30. On the information before me, I accept the time required for the Agency to undertake this consultation would involve a substantial diversion of the Agency's resources.

Would processing the request involve an unreasonable diversion of the Agency's resources?

31. 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

32. 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

33. 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 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 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 interrogate databases, examine and analyse the LEAP audit report results and conduct consultation on the documents identified.

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

Members of the public should have access to official records unless there is a compelling reason to refuse access. For the Applicant, I acknowledge that there is a strong personal interest in the documents.

While the subject matter of the FOI request is important to the Applicant, I do not consider there is a broader interest shared by the public in this particular matter that would be served by disclosure of the documents. I note that the Applicant has been provided with information by staff in my office on avenues for addressing concerns the Applicant has raised about corruption.

- (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.

I accept that the current case load is appropriately 500 FOI requests, which I consider is a large number of FOI requests awaiting finalisation by the Agency's FOI Unit; noting this number is not static given the number of FOI requests the Agency receives during a calendar year.

Based on the information before me and as set out above, I consider the Agency has provided sufficient information about the complexity involved in processing the documents subject to the Applicant's request, as well as its current workload and resources to demonstrate the work involved in processing the Applicant's request would impact upon its ability to complete its current work, namely approximately 500 other FOI requests.

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].

- (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 exchanged prior to the Agency's decision. I am satisfied the Agency responded reasonably to the Applicant's request, including providing the Applicant with:

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

I note that while the Applicant acknowledged the Agency's rationale for seeking to reduce the scope of the request to enable processing, the Applicant determined not to narrow their request.

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

Due to the work required to process the Applicant's FOI request, the current number of requests the Agency has on hand (500+), and the resources available in Agency's FOI Unit, 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 requests would likely interfere with the other operations of those areas.

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

Conclusion

35. 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

36. 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
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
39. 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.
40. 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

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).

When this decision takes effect

41. 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.

Other matters

42. Despite my decision, I note it is open to the Applicant to make a new FOI request to the Agency for the documents sought.
43. In doing so, the Applicant may wish to reduce the scope of any new request to cover a shorter timeframe (as suggested by the Agency during the consultation process), or to exclude personal affairs information of third parties in the document. In relation to the latter, in the event the Applicant later seeks personal affairs information in a document, the Applicant may wish to make a further FOI request seeking the names of Agency officers who accessed the LEAP record on specific dates in the document to ensure any consultation required to be undertaken by the Agency is suitably narrowed.