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Notice of Decision and Reasons for Decision

Applicant:	'AK9'
Agency:	Royal Children's Hospital
Decision Date:	6 September 2019
Exemptions considered:	Section 25A(1)
Citation:	*'AK9' and The Royal Children's Hospital (Freedom of Information)* [2019] VICmr 99 (6 September 2019)

FREEDOM OF INFORMATION – substantial and unreasonable diversion of resources – request for data – audit required

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

6 September 2019

Reasons for Decision

Background to review

1. The freedom of information request in question is the third in a series received by the Agency from the Applicant relating to attendance and treatment figures for the Agency's Gender Service.

2. In respect of the two prior applications, the Agency held data which had been collated by the Gender Service for purposes unrelated to the Applicant's requests. In accordance with section 19(1)(c), the Agency used a computer to retrieve and collate the data and produced written documents in a discrete form to the Applicant on or about 12 December 2018 and 7 March 2019.

3. By application dated 26 March 2019, the Applicant sought access to the following documents:

> … any documents or data held by the Royal Children's Hospital, Melbourne, that identifies how many children and adolescents were receiving Stage One treatment with 'puberty blockers' in 2018, 2017, 2016, 2015 and 2014.

4. The Agency concedes the documents sought on 26 March 2019 were sought in the prior two applications but were overlooked.

5. By letter dated 18 April 2019, the Agency wrote to the Applicant stating it intended to refuse the Applicant's request 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.

6. 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 reformulating the request.

7. The Applicant did not reformulate the terms of the request.

8. In its decision letter of 9 May 2019, the Agency advised the Applicant it had determined to refuse the request under section 25A(1).

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 information provided with the Applicant's review application; and

    (c) the Agency's submissions dated 12 June, 12 August and 28 August 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.

Review of application of section 25A(1)

13. 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.
>
> …

14. 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 unreasonably disruption to the day to day workings of the government through its agencies…

15. 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]

[1] [2001] VSCA 246 at [48].
[2] *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

16. 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]

17. 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

18. 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.

19. I have reviewed the Agency's notice of intention to refuse access dated 18 April 2019.

20. 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.

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

21. The words 'substantially' and 'unreasonably' have not been precisely defined in section 25A. In *McIntosh v Police*, [5] Victorian Civil and Administrative Tribunal (**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.

22. 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]

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[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 and Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

[5] (Vic) [2008] VCAT 916 at [21].

[6] Ibid, at [29].

[7] Ibid, at [26].

23. The Agency provided the following clinical background relevant to the terms of the Applicant's request, and the effect of those terms on the processing of the request:

> …there is a complex clinical background underpinning the information sought in the applicant's request, which is more properly the matter for expert clinical evidence. Such background is relevant to the applicant's request, because:
>
> (a) the applicant has conflated "Stage 1" treatment, as defined by the Australian Standards of Care and Treatment Guidelines for trans and gender diverse children and adolescents[8], solely with the administration of puberty-supressing hormones (which he refers to as "puberty blockers");
>
> (b) This conflation leads to an erroneous distinction between Stage 1 and Stage 2 treatments as being purely defined by the cessation of gender-supressing hormones and the commencement of gender-affirming hormones under Stage 2;
>
> (c) … patients do not simply stop the hormones administered under Stage 1 treatment when they transition to Stage 2 treatment. Puberty supressing hormones are phased out following the commencement of gender-affirming hormones under Stage 2 treatment over a period of time varying from 6 months to several years. The timing of cessation of puberty-suppressing hormones is based on individual factors relevant to that patient and their particular medical circumstances;
>
> (d) Accordingly, a patient may still 'receive' puberty-supressing hormones even though they have commenced Stage 2 treatment for Gender Dysphoria.
>
> [the Agency] therefore cannot simply look at whether a patient has commenced Stage 2 treatment in order to answer whether they are receiving puberty-supressing hormones at a particular date.

24. In summary, the Agency submits the following with respect to the time and resources that would be reasonably involved in processing the request:

(a) A new document would need to be created for the Applicant in order to process the request. Doing so would require a patient prescription audit (**audit**) to be carried out;

(b) The audit would involve the following estimated staff and time frames:

(i) One IT staff member approximately one day of work to generate a prescription data set (across five doctors and nine medications) for data held in the Electronic Medical Record (**EMR**);

(ii) Two days' work by a Gender Service paediatrician to analyse the data set against the patient record; and

(iii) For patient records created before the introduction of the EMR in April 2016 (approximately 30 patients), two days' work by a Gender Service paediatrician to review individual patient records for commencement and cessation dates of medications.

(c) The Gender Service is a multidisciplinary team which incorporates a variety of specialties and allied health providers from across the Agency. The Gender Service comprises a full-time equivalent (**FTE**)[9] of 4.2 employees, with additional resources funded from the Agency's operating budget.

(d) The Gender Service has five paediatricians, comprising 1.7 FTE employees. Accordingly, the Gender Service only operates 24.5 hours of paediatric gender clinics per week.

[8] Telfer, M.M., Tollit, M.A., Pace, C.C., & Pang, *K.C. Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents* Version 1.1. Melbourne: The Royal Children's Hospital; 2018.

[9] An individual working a 38-40 hour week is generally considered 1.0 FTE employee.

(e) The Gender Service is currently operating a wait list of longer than four months. Removal of clinicians from the service would divert an estimated 32 hours of care or 64 clinic review appointments away from Gender Service patients;

(f) It would be unreasonable to divert clinicians from other areas of the hospital to conduct the work, as doing so would impact upon the delivery of patient care in those areas;

(g) The expense to employ locum clinicians for the sole purpose of processing the Applicant's request would be burdensome and unreasonable.

25. 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.

26. 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*.[10]

27. 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.

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

The Applicant submits:

> The issue of the number of children and adolescents experiencing gender dysphoria and commencing treatment programs involving "puberty blockers" (Stage One) and gender affirming hormones (Stage Two) is receiving increasing discussion and debate in Australia. This discussion and debate is occurring both in Parliaments and in the public domain.
>
> …
>
> The Royal Children's Hospital Melbourne Gender Service is acknowledged as being one of the, if not the leading medical institution in Australia providing treatment programs for children and adolescents experiencing gender dysphoria.

I note the Applicant made their request for information within their official capacity as a member of Parliament, and I accept matters relating to the treatment of trans and gender diverse children and adolescents is an area of public, political and medical interest.

(c) Whether the request is reasonably manageable

I accept the Agency's submission that the most appropriate staff to carry out the tasks required to process the Applicant's requests are clinical staff of the Gender Service.

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 wording of the Applicant's request.

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

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

(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

Having reviewed correspondence between the Agency and the Applicant sent prior to the Agencies decision, I am satisfied the Agency responded reasonably to the Applicant's request, including providing the Applicant with an explanation of the work involved in processing the request and reasonable opportunities to revise the scope of the request.

I note the Applicant's response to the Agency's invitation to reformulate the terms of [their] request:

> This missing data can not be obtained by somehow reformulating the question in another way. The issue is I am requesting specific information that stands on its own.
>
> …I therefore reaffirm that the information as sought be provided to me…

(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.

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

Conclusion

29. 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

30. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.[11]

31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.[12]

32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.[13]

33. 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.

[11] The Applicant in section 50(1)(b) and the Agency in section 50(3D).
[12] Section 52(5).
[13] Section 52(9).

34. 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.[14]

When this decision takes effect

35. 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.

[14] Sections 50(3F) and (3FA).