

## Notice of Decision and Reasons for Decision

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Applicant:	'AO3'
Agency:	Victoria Police
Decision Date:	30 September 2019
Provision considered:	Section 25A(1)
Citation:	'AO3' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 129 (30 September 2019)

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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.

**Joanne Kummrow**  
Public Access Deputy Commissioner

30 September 2019

## Reasons for Decision

### Background to review

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

Complete LEAP [Law Enforcement Assistance Program] audit of self [name and date of birth] limited to sworn members of Victoria Police. Date range conception to [date].
2. By letter dated 7 June 2019, the Agency wrote to the Applicant advising it intended to deny access to the 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. The Agency recommended the Applicant limit the scope of their request to records for a time period after 2006.
4. In response, the Applicant agreed to reduce the scope of the request to [an approximate 12 year time period] excluding the period [of six months]. I note the Applicant excluded this period as [they have] made a separate FOI request for LEAP records for that period.
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).

### 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.
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*,<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> [2001] VSCA 246 at [48].

<sup>2</sup> Ibid at [11].

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.<sup>3</sup>

#### ***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, 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.<sup>4</sup>
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 to narrow the scope of their FOI request. However, the Agency decided that the Applicant did not sufficiently narrow the scope of the request to remove grounds for deciding not to process the request.
16. My review therefore is based on the Applicant's narrowed review request.

#### ***Review of the application of section 25A(1)***

17. I have considered the Agency's letter dated 7 June 2019, which advised the Applicant that it intended to refuse access to the documents unless the request was amended to a form that would remove the grounds for refusal. In that letter, the Agency advised:

Victoria Police implemented the LEAP database in 1993 and the system underwent a technological update that came into effect on 1 August 2006...

18. The Agency described what it would need to do to process pre and post 2006 records. As the Applicant narrowed [their] request to post 2006 records, I have considered the part of the Agency's advice relating to post 2006 records, including the following information:

The information you seek for post 2006 held in the LEAP database also requires substantial work as the processing of your request involves two separate tasks and task 2 requires substantial work.

##### **First task**

The Freedom of Information Unit (the FOI Unit), has conducted a LEAP audit and (sic) this produced over 50 records, excluding your records for your [additional FOI request noted above]. This number represents the police members and protective service officers who have accessed your (sic) record on the LEAP database for the period 2006 through to [date]. To determine whether the name of each member who accessed your LEAP record can be released to you requires an experienced Assessor to examine the LEAP audit results.

##### **Second task**

The FOI unit comprises of Assessors who have the required expertise to assess the LEAP audit results for release. Each of these records must be examined and appropriate consultation completed.

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<sup>3</sup> 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.

<sup>4</sup> *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

I cannot estimate the time processing the second task of your request would take FOI staff, as each employee is consulted by email and this inevitably results in phone call conversations.

An assessor from the FOI unit would be required to examine the document for your request in hard copy to determine whether to grant, refuse or defer access to the documents or to grant access to edited copies of such documents, undertake any consultation required, make edited copies of the documents, if applicable, and notify you of any interim or final decision on the request. At present that is an onerous task for the FOI unit, which is currently processing a large number of requests.

19. On the matter of consultation, 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.

20. 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*.

21. 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'.

22. 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 50 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 and would result in an unreasonable diversion of resources.

23. 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).

24. 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?*

25. I accept the Agency's advice that it currently has 5 FOI staff who are able to undertake the assessment of LEAP audit reports and at the time of this decision, the Agency has approximately 383 other FOI requests requiring processing.

26. I accept the Agency's submission that consultation with all Agency officers who accessed the Applicant's LEAP record during the time period requested would be required 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.
27. When determining whether to refuse a request under section 25A(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.<sup>5</sup> In line with this, while the Agency claimed it could not provide an estimate of the time the required consultation would take, I accept the email contact and likely subsequent telephone discussions with up to 50 Agency officers would require the dedication of significant time and resources by the FOI Unit.
28. 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?*

29. 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.<sup>6</sup>

30. 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*.<sup>7</sup>
31. 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 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.

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<sup>5</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

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

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

- (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 of the Agency is 383 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 number and 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.

- (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 note the Applicant agreed to reduce the scope of [their] request to post 2006 records, excluding the months of LEAP records [they have] already requested. I also note the Agency's consultation letter suggested the Applicant reduce the scope of the request to 'a time period post 2006' and did not suggest what time period would be possible for the Agency to process, or, when the Applicant requested the whole of the 2006 period, did not provide the Applicant with a further opportunity to narrow [their] request.

While I note that it would have been preferable for the Agency to have provided more information to the Applicant to allow the request to be processed, I must also consider whether the Applicant has taken a cooperative approach to narrowing the request. In my view, the Applicant had sufficient detailed information to consider it more than likely [their] request would be considered too broad even in its narrowed form. I have taken this view based on:

- the detailed information the Agency provided about how the documents would need to be processed, including assessment and consultation;
- the fact that [their] request for the same records for a 12-month period has been accepted by the Agency as being able to be processed; and
- that the Applicant requested 12 years of records, which I consider in the circumstances of this matter, would be unreasonable.

I also note that the Agency has met its obligations to consult with the Applicant.

I therefore consider that both parties could have cooperated better in this instance; however, there are not sufficient reasons for me not to accept the Agency's decision based on this factor.

- (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 (383), 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 request would likely interfere with the other operations of those areas.

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

## **Conclusion**

33. 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.

34. 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**

35. 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.<sup>8</sup>
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
38. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
39. 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.<sup>11</sup>

### **When this decision takes effect**

40. 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**

41. Despite my decision, I note it is open to the Applicant to make a new FOI request to the Agency for the documents sought. In doing so, the Applicant may wish to reduce the scope of any new request to cover a shorter timeframe.

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

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).