

Notice of Decision and Reasons for Decision

Applicant:	'AO4'
Agency:	Monash University
Decision Date:	30 September 2019
Provision considered:	Section 25A(1)
Citation:	'AO4' and Monash University (<i>Freedom of Information</i>) [2019] VICmr 130 (30 September 2019)

FREEDOM OF INFORMATION – university documents – 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 documents:
 1. Date when [named person] was registered as a PhD student, date when [they were] conferred this qualification and the name of [their] supervisor.
 2. All the documents that support [named person]'s contention [they] made in an email to [named person] that the allegations against [named person] + [named person] had been fully investigated by the University.
 3. All the documents of correspondence including the emails held by [named person] which have reference to myself.
 4. Documents in the file entitled [named person] held by the administration.
 2. The Applicant subsequently amended their request to be for the following:
 1. A document which shows the date on which [named person] was enrolled as a candidate for the qualification of PhD.
 2. A document which shows the date on which the qualification of PhD was conferred on [named person].
 3. A document which shows the name of [named person]'s supervisor whilst completing [their] PhD qualification.
 4. All documents which support the contention of the [named position] of the University, [named person], made in [their] email of [specified date] that concerns raised in an email from [named person]'s lawyer, [named person], of [specified date] "have all been dealt with and finally considered in the past".
 5. All documents held in the possession of [named person] in [their] capacity as an employee of the University which were sent to any other person which refer to [named person] or you as [their] legal representative.
 6. All documents held by the Administration that refer to [named person] and are dated:
 - (a) during [their] term of employment with the University; or
 - (b) between [specified years]; or
 - (c) from the period that [named person] took up full time employment with the University as an [specified position]; or
 - (d) during the time [named person] was [specified position].
 3. By letter dated 29 May 2019, in accordance with section 25A(6), the Agency advised the Applicant:
 - (a) it proposed to refuse to grant access to documents in accordance with the Applicant's request under section 25A(1) as it considered the work involved in processing the request would 'divert the resources of the University substantially and unreasonably from its other operations'; and
 - (b) before making its decision on the request the Agency provided the Applicant with several suggestions with a view to rescoping the request to remove the grounds for refusal.
 4. By email on 7 June 2019, the Applicant's legal representative responded to the Agency with further comments and addressed a number of queries in the Agency's letter of 29 May 2019. However, the Applicant did not narrow the scope of the request.
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5. In its decision letter, dated 11 June 2019, the Agency advised that consultation had not resulted in a narrowing of the scope of the Applicant's request and determined to refuse to grant access to documents in accordance with the request under section 25A(1).

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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 request for review and subsequent communications with OVIC;
 - (c) the Agency's submission dated 9 July 2019; and
 - (d) documents recording consultation between the parties in accordance with section 25A(6).
8. 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 under section 25A(1)

9. 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.

10. 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...

11. Once an agency decides to refuse to grant access to a request under section 25A(1), it bears the onus of establishing it has met the legal requirements for invoking this provision. Namely, that processing the request would substantially and unreasonably divert the resources of the agency from its other operations.²
12. I am required to consider whether section 25A(1) applies as at the time of my review. That is, I must determine whether the Agency 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 requirements under section 25A(6)

13. A decision to refuse to process a request under section 25A(1) cannot be made unless an agency first 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.⁴

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].

14. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse to grant access to the documents, and provided a reasonable opportunity for the Applicant to consult along with sufficient information to assist the Applicant in making the request in a form that would remove the ground for refusal. I note the Applicant's legal representative responded with further comments, but did not narrow the scope of their FOI request.
15. In the absence of agreement from the Applicant to narrow the scope of the request, I must complete my review on the basis of the Applicant's FOI request as detailed at paragraph 2 above.

Review of the application of section 25A(1)

16. In my review of this matter I must determine whether processing the Applicant's request represents both a 'substantial' and 'unreasonable' diversion of Agency resources in the circumstances.

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

17. 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.⁵
18. In its consultation letter and decision letter to the Applicant, the Agency provided details regarding the estimated quantity of documents relevant to the request and the time and staff resources required to process it as summarised below:
 - (a) The documents falling within the scope of the request are conservatively estimated to consist of more than 7,600 pages.
 - (b) The documents exist in various forms and are stored in a number of electronic and hard copy filing systems and databases held in multiple areas of the University, including the [specified areas].
 - (c) To locate documents and assess their relevance, searches would need to be conducted by at least 19 staff in various areas of the University. It is estimated that searching and retrieving documents and checking the documents for relevance would take staff over 250 hours.
 - (d) The staff members identified above have limited available time to respond to the request consistent with attendance to their core responsibilities. Responding to FOI requests forms only a small fraction of their day to day duties and the time to process the request in its present form would divert them substantially and unreasonably from fulfilling their core roles.
 - (e) Once documents have been located, the primary FOI officer would be required to examine and assess the relevant documents for exemptions, including consulting with individuals or entities that are entitled to be informed of the request for information about them in accordance with the FOI Act, before making a formal decision.
 - (f) There is one primary FOI officer employed by the Agency in a 0.6 full time equivalent (FTE) position, who dedicates 90% of their time to processing FOI requests. It is estimated that to examine the relevant documents and make a decision on whether they are exempt from disclosure, taking into account all relevant facts and circumstances (including the outcome of any consultation) would take the FOI officer at least six weeks if the officer worked exclusively on this task.
 - (g) At the time of the Applicant's request the Agency was processing four other FOI requests. The resources of the University are usually ample to deal with the number of requests received.
 - (h) As set out above, the [Agency] has formed the view that it will take well in excess of 30 days for the request to be processed and that processing the request in its current form and with current

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

resources would substantially and unreasonably divert the University's resources from its other operations.

19. In the Agency's submission, it reiterated the above estimates and further elaborated on the resources available to process the Applicant's request, noting the Agency's part-time FOI officer (0.6 full-time equivalent (**FTE**)) is the only staff member whose primary responsibility is to respond to and process FOI requests and the Agency generally receives around 25 FOI requests per year.
20. I acknowledge the Applicant's legal representative questioned the Agency's estimate of the likely number of relevant documents that would be likely to fall within the terms of the Applicant's amended request, describing it as 'arbitrary and extremely misleading'.
21. Having considered the terms of the Applicant's amended request, the Agency's decision letter and submission:
 - (a) I accept for the Agency to conduct a thorough and diligent search for documents falling within the terms of the Applicant's request, document searches would be required in multiple locations across the Agency.
 - (b) While I agree the Agency's estimate of time to process the request appears to be substantial and the likely number of relevant pages would be significant, I am of the view the Agency's estimate is reasonable given the Applicant has submitted a six-part request and has had dealings with the Agency over a considerable period of time, dating back to [specified year].
 - (c) In any case, even if the number of documents was significantly less (e.g. 2500 documents), I am satisfied the scope of the Applicant's amended request and the processing of it would involve a substantial diversion of the Agency's resources as it would necessarily divert multiple staff from their ordinary duties to undertake document searches.
 - (d) I also accept, given the age of the documents sought by the Applicant, which would reasonably date back to [specified year], document searches would require Agency staff to manually search archived hard copy records to identify documents relevant to the Applicant's request. I agree that to do this would add considerably to the time taken to process the request.
22. Accordingly, on the information before me, I am satisfied the time required for the Agency to undertake document searches, identify relevant documents and assess those documents would involve a substantial diversion of the Agency's resources.

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

23. 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

24. 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
25. I consider the following factors particularly relevant in the circumstances of this case:

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].

- (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 are sufficiently precise to enable the location of documents relating to the Applicant's request to be identified by the Agency. However, as stated above, I accept, given the age of the documents sought by the Applicant, which would reasonably date back to [specified year], document searches would require Agency staff to manually search archived hard copy records to identify documents relevant to the Applicant's request. I agree that to do this would add considerably to the time taken to process the request.

- (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. In this case, I acknowledge the Applicant has a personal interest in obtaining access to the documents. However, on the information before me, having considered the subject matter of the request, I do not consider there is a broader public interest that would be served by disclosure of the documents sought.

- (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.

The Agency advised that, at the time of receiving the Applicant's amended request, it had five rather than four other FOI requests and the Agency usually processes about 25 FOI requests per year.

As detailed above, the Agency has one part time FOI officer, who devotes 90% of their time to processing FOI requests and 10% to other duties. It is estimated that, if the FOI officer was to work exclusively on this request, forgoing work on other FOI requests, it would take them over 30 working days to process the request. This does not include the time any subsequent third party consultation would take.

As at 30 September 2019, the Agency has confirmed that at the time of my decision, its resourcing remains consistent with one FOI officer (now 0.8 FTE) who is able to dedicate 70% of their time to processing requests, and the Agency has four other FOI requests in progress.

Based on information before me, I consider the Agency has provided sufficient information about the likely number of relevant documents and the manual effort required to locate and process relevant documents subject to the Applicant's request, as well as its current FOI workload and resources to demonstrate the work involved in processing the Applicant's amended request would significantly impact upon the FOI unit and the ability of other Agency staff to complete other core 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 to refuse to grant access to documents. I am satisfied the Agency responded reasonably to the Applicant's request, including providing the Applicant with:

- (i) an explanation of the work involved in processing the FOI request, searching, identifying and assessing relevant documents;
- (ii) a reasonable opportunity to revise the scope of the Applicant's request; and
- (iii) suggested ways for the Applicant to narrow the request that would allow the Agency to process it.

I note that, while the Applicant engaged with the Agency in an attempt to limit the number of documents that would fall within the request by limiting the areas of the Agency required to be searched, the Applicant did not narrow the scope of the request.

(e) The 30 day statutory time limit for making a decision in this application.

Given the breadth of the Applicant's request, which covers an extensive period due to the Applicant's dealings with the Agency over a considerable period of time, dating back to [specified year], I accept document searches would be required across multiple locations and repositories.

Further, given the Agency's limited FOI unit resources, I consider it would be difficult for the Agency to process the request within the statutory timeframe under section 21 and that processing the request would likely interfere with the other operations of both the FOI officer and other impacted areas.

26. Accordingly, on the information before me, I am satisfied the diversion of resources would also be unreasonable in this matter.

Conclusion

27. On the information available, 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.
28. 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 (as suggested by the Agency during the consultation process) or seek only specific documents or categories of documents. The Applicant may then wish to make a further, suitably narrowed, FOI request to seek additional documents from the Agency.

Review rights

29. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
32. 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.
33. 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

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).

34. 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.