

## Notice of Decision and Reasons for Decision

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Applicant:	'AO8'
Agency:	Department of Education and Training
Decision Date:	4 October 2019
Provision considered:	Section 25A(1)
Citation:	'AO8' and Department of Education and Training ( <i>Freedom of Information</i> ) [2019] VICmr 134 (4 October 2019)

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FREEDOM OF INFORMATION – disputes and complaints – 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 decision in that I have decided to 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  
4 October 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - 1) All documents related to or with reference to [the Applicant], [named person] and [named person] between [date range] from or between [named persons] of [named] Primary School.  
Specific documents sought are:
    - Written documents;
    - Internal emails;
    - Emails sent to and from external parties, offices or departments; and
    - All correspondence between department personnel in written or electronic form.
  - 2) All written documents, notes and any reports made in relation to [named persons] from any participation from the [redacted] program run at [named] Primary School between [date range].
  - 3) All correspondence and notes in written or electronic form between [named persons] of [named] Primary School in relation to [named persons] between [date range].
  - 4) All Magistrates and Federal Family Court subpoenas served on the [position title] and or [named person] of [named] Primary School between [date range].
  - 5) All and or any pages of Federal Circuit Court of Australia and or Family Court of Australia Affidavit in the matter of [named persons] between [date range].
2. I note the Applicant previously made a request to the Agency for access to certain documents, which it determined was not valid under section 17(2). Following consultation with the Agency, the Applicant submitted a valid request in the terms detailed above.
3. By letter dated 17 July 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.
4. 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 so it could be progressed.
5. The Applicant responded to the Agency by email stating they 'seek all information in my application'.
6. In its decision letter dated 18 July 2019, the Agency advised 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

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

- (c) the information provided with the Applicant's review application; and
  - (d) the Agency's submission dated 2 August 2019.
10. 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)***

11. One of the 'exceptions' referred to in section 3, which sets out of the object of the FOI Act, is section 25A(1).
12. Section 25A(1) provides that a request for documents may be refused by an agency in certain circumstances after consultation with an applicant in accordance with section 25A(6):
- (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.

13. The Victorian Supreme Court of Appeal in the 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 [in facilitating the individual's right of access to information] 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.

14. The Supreme Court of Victoria has held the meaning of the words 'other operations' in section 25A(1) includes an agency's ability to deal with and process other FOI requests received where its ability to do so would be impaired by dealing with and processing the applicant's FOI requests.<sup>2</sup>
15. 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.<sup>3</sup>
16. 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 its resources from its other operations under section 25A(1) rather than when the Agency decided to refuse to process the request.<sup>4</sup>

#### **Consultation requirements under section 25A(6)**

17. A decision to refuse to a request under section 25A(1) cannot be made unless the agency gives 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, provided information to assist the applicant to assist them in amending their request to a form that would remove the proposed ground for refusal.<sup>5</sup>
18. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access to the documents, provided a reasonable opportunity for the Applicant to consult and provided sufficient information to assist the Applicant in making their request in a form that would remove the proposed grounds for refusal.
19. In the absence of agreement from the Applicant to narrow the scope of the request, I must complete my review based on the Applicant's request as detailed set out in paragraph 1 above.

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

<sup>2</sup> *Chief Commissioner of Police v McIntosh* [2010] VSC 439 at [24].

<sup>3</sup> [2001] VSCA 246 at [11].

<sup>4</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>5</sup> *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

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

20. 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?*

21. When determining whether to refuse an FOI 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 that section 25A(1) is designed to avert.<sup>6</sup>
22. I have considered the Agency's submission, dated 2 August 2019, regarding the estimated quantity of documents relevant to the Applicant's request and the Agency's available resources and workload at that time, as summarised below:
- a limited search of the Agency's FOI Unit's identified over 1,500 pages of documents relevant to points 2, 3, 4 and 5 of the Applicant's request. The Agency noted that this was not an exhaustive list, and that the initial search results had not been comprehensively evaluated;
  - documents likely captured by point 3 of the Applicant's request would be stored on back-up media tapes, the restoration of which would require approximately four days' work by Agency staff outside the FOI unit; the FOI Unit comprises five full time and two part-time FOI Officers, who are available to process FOI requests on behalf of the Agency;
  - as at 2 August 2019, the FOI Unit was processing:
    - 49 FOI requests;
    - Have 19 Victorian Information Commissioner complaints and reviews to respond to;
    - Have 11 matters before the Victorian Civil and Administrative Tribunal; and
    - One matter before the Court of Appeal, Supreme Court of Victoria.
23. On 1 October 2019, the Agency confirmed the current resources of its FOI Unit had been reduced from five to four full time and two part time FOI officers and its current workload comprised:
- (a) 39 FOI requests;
  - (b) 16 complaints and reviews before the Victorian Information Commissioner to which it was required to respond;
  - (c) 11 matters before the Victorian Civil and Administrative Tribunal; and
  - (d) 1 matter before the Victorian Court of Appeal.
24. On the information before me, I accept the time required for the Agency to undertake a thorough and diligent search for all relevant documents, and to then identify and assess those documents, would involve a substantial diversion of the Agency's resources from its other operations.

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<sup>6</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

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

25. 'Unreasonableness' was considered by the Commonwealth Administrative Appeals Tribunal in *Re SRB and Department of Health, Housing, Local Government and Community Services*, in which 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>7</sup>

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*.<sup>8</sup>

27. I consider the following factors particularly relevant in the circumstances of this matter:

- (a) Whether the terms of 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.

Having considered the terms of the Applicant's request, as set out at paragraph 1, I am satisfied they are not sufficiently precise to enable the Agency to practicably identify and locate the documents sought within a reasonable time and exercising reasonable effort. In particular, points 1 and 2 of the request, which are broad and cover a substantial period of time.

This finding takes into account the time and resources required to interrogate databases, examine, and, if necessary, consult agency officers and other third parties as to documents.

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

Consistent with the object of the FOI Act, there is a public interest in members of the public having a right to access information and documents held by government unless it is necessary to refuse access under an exception or exemption in the FOI Act to protect 'essential public interests and the private and business affairs of persons in respect of whom information is collected and held'.<sup>9</sup>

However, in *Mildenall v Department of Education*,<sup>10</sup> VCAT held:

Section 25A seeks to balance competing interests. There is a public interest in agency not being diverted from its core work through needing to process a very broad-ranging request for documents.

Noting the subject matter of the request, I consider the Applicant has a strong personal interest in obtaining access to the documents. However, on the information before me, I am not satisfied there is a broader public interest that would be served by disclosure of the documents sought in this matter. Nor am I satisfied the Applicant's personal interest in the documents outweighs the public interest in the Agency not being diverted from its other operations due to the broad ranging nature of the FOI request.

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<sup>7</sup> *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

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

<sup>9</sup> Section 3(1).

<sup>10</sup> (unreported, VCAT, 19 April 1999) at [30].

- (c) The Agency's estimate as to the numbers of documents affected by the request, and by extension the number of pages and the amount of officer time, and the salary cost.

As detailed above, the Agency's FOI Unit conducted a preliminary document search and identified over 1,500 pages of documents relevant to points 2, 3, 4 and 5 in the Applicant's request only.

I also note the Agency's advice that processing documents relevant to point 3 alone would impact Agency staff outside the Agency's FOI Unit and require several days' work due to the need to search archived emails and restore emails from backup tapes given the relevant document date range.

At the time of its decision, the Agency was processing 49 FOI requests. As at the time of my decision, the Agency has 39 open FOI requests, as well as a range of FOI matters before other tribunals or courts.

At the time of my decision, the Agency's FOI Unit comprises four full time and two part time FOI officers who are responsible for processing FOI requests received by the Agency.

Based on the above information, I accept the Applicant's request would represent a considerable burden for the Agency's FOI Unit to process based on the preliminary document search, which identified 1,500 pages of documents relevant to point 3 in the Applicant's request only.

- (d) 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.

As set out above, I am satisfied the Agency has provided sufficient information about the large number of documents that would fall within the terms of the Applicant's request, as well as its current FOI request workload and resources to demonstrate the work involved in processing the Applicant's request would significantly impact upon the ability of the FOI unit, as well as other Agency staff, to complete their other operations.

- (e) The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a cooperative 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 to refuse to process the request.

I am satisfied the Agency responded reasonably in response to the Applicant's request, including by providing a reasonable opportunity for the Applicant to revise the request, and by providing suggested terms for a refined request that would allow the Agency to process the request.

- (f) The statutory time limit under section 21 for making a decision on this application.

Based on the Agency's estimate of the work required to process the Applicant's request, the number of FOI requests the Agency has on hand, and the resources available both to the FOI Unit and the various business units required to conduct document searches, I consider it would be difficult for the Agency to process the request within the statutory timeframe under section 21 and would likely interfere with the operations of those other Agency areas.

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

## **Conclusion**

29. On the information before me, I am satisfied the work involved in processing the Applicant's 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.
30. Despite my decision, the Applicant is not precluded from making a new FOI request to the Agency seeking access to documents. In doing so, the Applicant may wish to reduce the scope of any new request to documents of a specific area of the Agency, a specific date range and/or a specific kind of documents as suggested by the Agency during the consultation process.

## **Review rights**

31. If either party to this review is not satisfied with my decision, they are entitled to apply to **VCAT** for it to be reviewed.<sup>11</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
34. 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.
35. 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>14</sup>

## **When this decision takes effect**

36. 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.

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<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).