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Notice of Decision and Reasons for Decision

Applicant:	'AK8'
Agency:	Country Fire Authority
Decision Date:	5 September 2019
Provision considered:	Section 25A(1)
Citation	'AK8' and Country Fire Authority (<i>Freedom of Information</i>) [2019] VICmr 98 (5 September 2019)

FREEDOM OF INFORMATION – refusal to process an FOI request – substantial and unreasonable diversion of the Agency's resources

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 determined to refuse the Applicant access to documents in accordance with section 25A(1).

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

5 September 2019

Reasons for Decision

Background to review

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

Copy of all investigations, notes and documents regarding the investigation of bullying and harassment allegations made by [the Applicant] against CFA staff these should include:

1. The investigations of [the Applicant's] original complaints to [a specified incident] and the investigations made by [specified group of individuals] of these complaints;
 2. The investigations by [named individual] into the investigation by [specified group of individuals] and subsequent apparent bullying by [specified group of individuals];
 3. The investigations by the CFA complaints department of all issues regarding [the Applicant's] bullying complaints;
 4. The investigation by [named individual] subsequent to [the Applicant's] complaint to [named individual];
 5. The investigation of [the Applicant's] complaint by [named individual] after it was revealed that there had apparently been no investigation by [named individual];
 6. The investigation of [the Applicant's] complaint by [named individual];
 7. Any documents regarding action taken against any CFA paid staff or volunteers with regard to [the Applicant's] complaints, and any resolution documents that have been created by CFA with regard to this issue;
 8. Copies of the formal complaints that have been made against [the Applicant] by CFA staff and any associated documents.
2. In its decision, the Agency refused to grant access to documents in accordance with the request under section 25A(1) on the basis the work involved in the Agency processing the request would substantially and unreasonably divert its resources from its other operations.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Agency's submission dated 12 August 2019;
 - (c) information provided with the Applicant's review application; and
 - (d) communications between OVIC staff, the Applicant and the Agency.
6. 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 exemptions

7. The Agency's decision letter sets out the reasons for its decision to refuse to grant access to documents under section 25A(1).
8. Section 25A(1) provides:

25A Requests may be refused in certain cases

- (1) The Agency... 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... 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... may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency... 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... is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.
- (4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency... must not have regard to –
 - (a) any reasons that the person who requests access gives for requesting access; or
 - (b) the agency's ... belief as to what are his or her reasons for requesting access....
- (6) An agency... 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.

9. In the Victorian Supreme Court of Appeal decision of *Secretary, Department of Treasury and Finance v Kelly*,¹ Chernov JA stated:

... it is plain enough that section 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 ...

Consultation

10. I am satisfied the Agency, in its letter dated 1 February 2019, provided the Applicant with an opportunity to consult, as required under section 25A(6), where it provided the Applicant with information to assist in making the request in a form that would remove the grounds for refusal.

Substantive diversion of resources

11. I have considered the Agency's consultation letter, decision letter and submission. I am satisfied, based on the range of topics and categories of documents requested, and on the limited resources available to the Agency, the processing of the request would involve a substantial diversion of the Agency's resources.

Unreasonable diversion of resources

12. In this regard, in the decision of *Re SRB and Department of Health, Housing, Local Government and Community Services*,² the Commonwealth Administrative Appeals Tribunal held:

...it is not necessary to show... that the extent of the unreasonableness is overwhelming. It is this Tribunal's task to weigh up the considerations for and against the situation and to form a balanced judgment of reasonableness, based on objective evidence.

13. The Victorian Civil and Administrative Tribunal (**VCAT**) in its decision, *The Age Company Pty Ltd v CenITex*,³ considered the following factors in deciding whether the diversion would be unreasonable. In my view, these factors are also relevant in this matter. I discuss each of them below.

- (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.

In its consultation letter, the Agency sought further clarification from the Applicant in order to obtain a precise description of the requested documents. The Agency asked the Applicant to provide further clarification in relation to:

- the term 'investigation' as certain incidents referred to in the Applicant's request were managed as desktop reviews and not investigations;
- specific details of the various complaints made by the Applicant;
- specific details of the investigation by [the specified group of individuals]; and
- a timeline and specific details of the complaints and investigations involving [three named individuals].

¹ [2001] VSCA 246 at [48].

² (1994) 19 AAR 178 at [34].

³ [2013] VCAT 288 at [43]-[45].

I am satisfied the terms of the Applicant's request were not sufficiently precise enough to enable the Agency to practicably identify and locate the documents sought by the Applicant within a reasonable time and involving the exercise of reasonable effort.

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

There is a clear public interest in ensuring government agencies appropriately manage complaints relating to bullying and harassment. However, there is also a significant public interest in agencies not being unreasonably disrupted and diverted from their normal operations due to the processing of large FOI requests.

On [date], the Applicant advised OVIC of a current dispute between the Applicant and the Agency, which the Applicant states is the reason they are seeking access to documents. On the information before me, I am not satisfied this factor alone demonstrates the public interest would be served by disclosure of the documents sought given the broad terms of the Applicant's request.

For example, in the event the Applicant has made a complaint to an oversight body, it is likely that body would be able to require the Agency to disclose or produce any documents relevant to that body's determination of the Applicant's complaint.

(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 it has one full-time person processing FOI requests. The Agency also has one new, temporary staff member who is being trained to process FOI requests. Given the available staffing resources, I am satisfied the processing of the Applicant's request, as currently framed, would have a detrimental impact on the Agency's ability to complete its current workload, including the processing of other FOI requests made to the Agency within the statutory time period or other agreed period.

(d) 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.

The Agency's submits:

... [The Applicant] has had many matters with this organisation and there are multiple very large files across many areas of our organisation that relate to [them] in some capacity. I'm envisaging there could be in the realm of 450 documents.

The Agency advised OVIC it was processing 54 FOI requests at the time of its decision to refuse to grant access to documents sought by the Applicant. As at the time of my decision on review, the Agency advised it has 31 open FOI requests.

I also note that in the financial year 2018-19, the Agency received a total of 81 FOI requests.

Based on the above information, I accept the Applicant's request in its current terms would represent a considerable burden for the Agency to process as a single request in light of other FOI requests it is currently processing.

(e) The reasonableness or otherwise of [the Agency's] initial assessment and whether [the Applicant] has taken a co-operative approach in redrawing the boundaries of the application.

The Agency's consultation letter, dated 1 February 2019, invited the Applicant to consult with the Agency and to refine the request to allow the Agency to comply with the FOI Act without diverting its resources. The Agency requested a response by 1 March 2019.

On 14 June 2019, following no response from the Applicant, the Agency advised the Applicant it had provided an opportunity to consult and there had been no change to the original request.

On 5 July 2019, the Applicant informed OVIC they were unable to engage with the Agency in writing for personal health-related reasons. I note the Agency's consultation letter did not require the Applicant to provide written submissions and it provided the Applicant with an option to contact the nominated Agency officer by telephone.

On 21 August 2019, in the course of this review and with a view to informally resolving this matter, the Agency proposed to OVIC a narrowed scope for the request for the Applicant's consideration.

On 22 August 2019, OVIC conveyed the suggested narrowed scope for the FOI request to the Applicant, namely:

OVIC'S assessment:

I have negotiated with the Agency who has agreed to process either **ONE** of the following terms of request as it would not be a substantial or unreasonable diversion of the Agency's resources:

- Documents relating to a single investigation – please provide specific information about the investigation and the approximate date; **OR**
- Documents relating to complaints made about you within a specific period of time; **OR**
- Documents relating to a single investigation about an individual – please provide any relevant information and an approximate date range.

NEXT STEPS:

1. Please advise me of your views on the narrowed scope of review.
2. If you select one of the proposed options, I will relay this to the Agency who have offered to process it as a new FOI request with no application fee charged to you.

On 22 August 2019, the Applicant responded to OVIC stating in part:

If the CFA are willing to supply any of the documents then they need to be willing to supply all the documents requested.

Accordingly, the Applicant was taken to have not agreed to amend or narrow the scope of their original FOI request.

(f) The statutory time limit for making a decision in this application.

The Agency was unable to provide a timeframe within it would be likely to process the Applicant's request due to the broad and ambiguous terms of the Applicant's request. However, on the various types of documents involved in this request and the likely need to conduct a range of further consultations,⁴ I am satisfied it would be difficult for the Agency to process the request within the statutory timeframe subject to any extensions of time that may be required with the Applicant's agreement.

(g) The degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made.

The Agency's submission advised the Applicant had been a volunteer with the Agency for approximately [number of] years. Given the various complaints and investigations listed in the terms of the Applicant's FOI request, I consider there to be high degree of certainty in the Agency's initial estimate of there being approximately 450 documents falling within the scope of the Applicant's FOI request.

The Agency's submission does not provide an estimate of the time to process the Applicant's FOI request. However, for the purposes of this review, I refer to my comments above, I am satisfied it would be difficult for the Agency to process the Applicant's request within the

⁴ The Agency approximated 5-10 names per document.

statutory timeframe subject to any extensions of time that may be required with the Applicant's agreement.

- (h) [The Applicant] is a repeat FOI Applicant.

On the information before me, this factor is not relevant.

Conclusion

14. Having considered the above factors, I am satisfied the work involved in the Agency processing the Applicant's FOI request would substantially and unreasonably divert the current resources of the Agency from its other operations, including the processing of other current FOI requests.
15. Accordingly, I have determined to refuse to grant access to the documents in accordance with the request under section 25A(1).
16. While I have determined to refuse to grant the Applicant access to the documents in this matter, it is open to the Applicant to make a new FOI request to the Agency seeking a narrower scope of documents. If required, I encourage the Applicant to engage with the Agency to clarify and re-scope any such future request with a view to the Agency not needing to rely on section 25A(1) to refuse to grant access to documents in accordance with the request.

Review rights

17. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵
18. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
19. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
20. 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.
21. 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.⁸

When this decision takes effect

22. 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.

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).