

Notice of Decision and Reasons for Decision

Applicant:	'AQ7'
Agency:	Department of Health and Human Services
Decision Date:	29 October 2019
Provision considered:	Section 25A(1)
Citation:	'AQ7' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 151 (29 October 2019)

FREEDOM OF INFORMATION – substantial and unreasonable diversion of Agency resources from its other operations – complaints

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.

I have refused to grant access to the documents in accordance with the Applicant's request under section 25A(1) as I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
29 October 2019

Reasons for Decision

Background to review

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

...ALL documents referring to any complaints by any disgruntled clients or otherwise (including members of judiciary, or any other professional body particularly competitors) levelled against [the Applicant] or [third party].

... [including] copies of the complaints themselves, the methods used to substantiate such complaints, body of evidence used in this process, and any or all relevant materials that are related even remotely to making these claims or substantiating them by the investigators and anyone else used in order to reach the conclusion(s) that was reached at the end of the investigation(s).

2. By email dated 31 May 2019, the Applicant agreed to re-scope the request to the following terms:

... a copy of the investigation report into complaints made against [the Applicant], [third party] or the Academy of Health Education Victoria, in relation to [their] role as Behaviour Change Program providers.

3. In its decision dated 2 July 2019, the Agency identified 157 pages of documents falling within the terms of the Applicant's request. It decided to refuse access the documents in full citing the exemptions under sections 32(1), 33(1) and 35(1).

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's fresh decision to refuse access.
5. During the review, the Agency discovered over 670 additional documents relevant to the terms of the Applicant's re-scoped request as detailed at paragraph 2. The Agency advised the Applicant that a total number of 833 pages fall within the scope of the request.
6. Section 49M(1) permits an Agency to make a fresh decision on an FOI request during a review. On 25 July 2019, the Agency advised the Applicant of its intention to make a fresh decision. The Agency subsequently wrote to the Applicant on 12 August 2019, advising it intended to deny access to the documents under section 25A(1) as it considered the work involved in the processing of the request would substantially and unreasonably divert the resources of the Agency from its other operations.
7. 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 further limit the scope of their request to:

... a copy of the investigation report, **excluding any annexures and enclosures**, into complaints made against [the Applicant], [third party] or the Academy of Health Education Victoria, in relation to [their] role as Behaviour Change Program providers.
8. The Applicant was also advised of the option of submitting a separate FOI request for the annexures and enclosures.
9. The Applicant advised they were unwilling to further refine the scope of their request.
10. On 22 August 2019, the Agency made a fresh decision which detailed consultation had not resulted in a narrowing of the scope of the request and it had determined to refuse to process the request, pursuant to the provisions of section 25A(1). This decision was made within the required 28 days under section 49M(2).

11. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review of the fresh decision.
13. I have considered all communications and submissions received from the parties, including:
 - (a) the Applicant's original FOI request;
 - (b) the Agency's fresh decision on the FOI request;
 - (c) correspondence between the Agency and the Applicant leading up to its fresh decision;
 - (d) the Agency's submission dated 17 September 2019 describing its workload at that time;
 - (e) the Applicant's request for review, submissions dated 3 July 2019 and correspondence dated 22 August 2019; and
 - (f) all other communications between OVIC staff with the Applicant and Agency.
14. 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)

15. Section 25A(1) is an exception under the FOI Act that provides an FOI request may be refused in certain circumstances following an agency's consultation with an applicant in accordance with section 25A(6).
16. Specifically, section 25A 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.

17. The Victorian Supreme Court of Appeal in *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...

18. 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.²

19. Once an agency decides to refuse an FOI request under section 25A(1), it bears the onus of establishing it has met the requirements of the exemption. Namely, processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.³

20. In reviewing the Agency's decision, I am required to consider whether the requirements of section 25A(1) are satisfied at the time of my review. That is, whether at the time of my decision, processing the FOI request would substantially and unreasonably divert the Agency's resources from its other operations.⁴

¹ [2001] VSCA 246 at [48].

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

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

Consultation under section 25A(6)

21. 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 applicant's request and 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.⁵
22. I am satisfied, before making its decision, the Agency provided the Applicant 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 while the Applicant did re-scope their original request in the initial stages of the FOI process, they determined not to further narrow the scope of their FOI request once advised of the additional documents located by the Agency.

Review of the application of section 25A(1)

23. Following consultation between an agency and an applicant under section 25A(6) and where an agency and an applicant do not reach agreement as to a revised scope for the applicant's FOI request, I must complete my review based on the applicant's original request.
24. In this case, my review concerns the Applicant's re-scoped request, as per paragraph 2 above, and whether, at the time of my decision, the Agency processing the Applicant's request would represent both a substantial and unreasonable diversion of the Agency's resources from its other operations.

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

25. 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 refuse the request. To require that the issue be determined with absolute certainty would compel the Agency to undertake the very work that section 25A(1) is designed to avert⁶.
26. In its consultation letter and decision letter to the Applicant, the Agency provided details regarding the quantity of documents relevant to the request and the time and staff resources required to process it as summarised below:
 - (a) There are over 800 pages of documents matching the terms of the Applicant's revised request.
 - (b) The Agency's FOI unit's resources, specifically the non-personals team, is dedicated to processing FOI requests from the media, members of parliament and the general public seeking access to non-personal documents. In addition, this team is involved in responding to Parliamentary Orders to produce documents and other functions relating to the [Agency's] obligations under the Act.
 - (c) At the time the fresh decision was made, the non-personal team had three full time officers available to process FOI requests and roughly 50 FOI requests on hand.
 - (d) It is estimated that each page of captured material would generate approximately 25 minutes of work for the [FOI] assessor. In arriving at [this] figure, the [Agency] relied on section 25A(2) of the Act to include the following factors:

⁵ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

- Saving documents onto the case management system, TRIM and in the shared computer drive;
- Drafting internal and external correspondence such as emails, letters and briefings;
- Phone conversations or meetings with staff from relevant program areas and third parties to understand the subject matter of the request;
- The need to undertake mandatory consultations with approximately 20 third parties in accordance with section 33(2B) and 35(1A). This includes attempting to obtain third parties' contact details, preparing redacted documents for consultation, drafting correspondence for consultation;
- Undertaking legal research; and
- Assessing the documents including the physical redactions of documents. This includes cross referencing documents to ensure consistency in redactions of material.

(e) The [Agency] has already assessed approximately 150 pages in the course of making the original decision. Therefore, it is estimated that it would take 270 hours (approximately seven weeks) to process the remaining 600+ pages relevant to the Applicant's revised request. This estimate also assumes one [FOI] officer would work on the Applicant's revised request to the exclusion of all other duties.

25. Accordingly, on the information before me, I am satisfied the time required for the Agency to process this request would involve a substantial diversion of the Agency's resources.

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

26. The term 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, local Government and Community Services*, where the Commonwealth Administrative Appeals 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.⁷

27. 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*,⁸ in which VCAT considered relevant factors when determining if a request involves an unreasonable diversion of an agency's resources. I consider these factors below in the context of this matter:

(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 to be identified within a reasonable time. This does not, however, take into account the time and resources that would be required to examine, analyse, and consult upon those documents.

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

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

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

I consider members of the public should have access to official records, unless there is a compelling reason to deny access to documents. However, I also consider it reasonable for agencies to be able to consult with an applicant to ensure their request does not unreasonably divert the resources of the agency.

For the Applicant in this case, I acknowledge there is a personal interest in seeking access to the documents. However, having considered the subject matter of the request I do not consider there is a broader public interest in disclosure of the documents in this instance.

- (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, at the time of making its fresh decision, the team available to process FOI requests comprised three full time officers and there were approximately 50 other FOI requests on hand. As at the time of my decision, the Agency confirmed this resourcing and caseload remains consistent.

The Agency estimated processing the request would take 270 hours (approximately seven weeks) if one officer focused on processing the Applicant's request to the exclusion of all other duties.

Based on information before me, I am satisfied the Agency has provided sufficient information in relation to the likely number of relevant documents and the resources required to locate and process relevant documents relevant to the 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 sent prior to the decision to refuse to process the request. I am satisfied the Agency responded reasonably in response to the Applicant's request, including by providing reasonable opportunities for the Applicant to revise the request, and by providing suggested wording that would allow the Agency to process the request.

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

Due to the work required to process the request, the number of requests the Agency has on hand, and the resources available both to the FOI unit and the business unit conducting the search, 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 other operations of those areas.

28. Having considered the above factors, I am satisfied the diversion of resources would also be 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.
30. Despite my decision, I note it is open to the Applicant to make a new FOI request to the Agency for the documents sought.
31. In doing so, the Applicant may wish to reduce the scope of any new request to '...a copy of the investigation report, excluding any annexures and enclosures, into complaints made against [the Applicant], [third party] or the Academy of Health Education Victoria, in relation to [their] role as Behaviour Change Program providers' (as suggested by the Agency during the consultation process). The Applicant may then wish to make a further FOI request seeking any annexures and enclosures.

Review rights

27. 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.⁹
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
30. 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.
31. 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.¹²

When this decision takes effect

32. 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.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).