

Notice of Decision and Reasons for Decision

Applicant:	'AR1'
Agency:	Victorian Legal Services Commissioner
Decision date:	8 November 2019
Provision considered:	Section 25A(1)
Citation:	'AR1' and Victorian Legal Services Commissioner (<i>Freedom of Information</i>) [2019] VICmr 155 (8 November 2019)

FREEDOM OF INFORMATION – investigation file – complaint file – audit file – requests may be refused in certain circumstances – 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.

I have decided to refuse to grant access to 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
8 November 2019

Reasons for Decision

Background to review

1. By letter dated 25 January 2019, the Applicant made a Freedom of Information (**FOI**) request to the Agency after receiving a preliminary view letter from the Agency arising from actions undertaken by the Agency under the *Legal Profession Uniform Law Application Act 2014* (Vic).
2. The Applicant sought access to the following documents in their original FOI request (the **request**):
 1. your file for this investigation [file number];
 2. your file(s) for the complaints in relation to the [type of letters] letters sent by [Applicant's business] in conjunction with [named business]. My recollection is that there were two files- one of which was your ref [file number];
 3. your file for my complaint against [named Agency officer] – your ref [file number];
 4. your files in relation to the general correspondence regarding our [business] practice and the compliance audit of [date];
 5. any other material considered by you in coming to your “preliminary view”.

Agency's consultation letter dated 26 February 2019

3. By letter dated 26 February 2019, the Agency wrote to the Applicant in accordance with section 25A(6) to notify the Applicant of its intention to refuse to grant access to documents in accordance with the request under section 25A(1) on grounds 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 Agency's letter invited the Applicant to consult with an Agency officer in relation to rescoping the terms of the Applicant's request with a view to removing the proposed grounds for refusal.
5. Throughout March and April 2019, the Applicant and Agency exchanged correspondence regarding the scope of the Applicant's request. I have reviewed all correspondence from both the Applicant and Agency during this period and summarise the correspondence as follows.

Applicant's letter dated 5 March 2019

6. By letter dated 5 March 2019, the Applicant advised the Agency they seek access to the Agency's investigation complaint file to be able to respond to 'specific allegations against me made as part of an investigation being conducted' by an Agency officer. This includes, 'the evidence upon which [an Agency officer] has relied in order to respond fully' (the **investigation file**).
 7. Further, the Applicant seeks access to Agency files in relation to the 'general operation of our [type of legal practice] practice and the compliance audit' previously conducted by the Agency to assist the Applicant in their response to the allegations put to the Applicant by the Agency (the **audit file**).
 8. The Applicant advised, while they seek access to documents that 'relate more broadly to my dealings with your office', they are willing to not seek access to these documents at this time, but may do so in a new request.
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9. Finally, the Applicant requested, 'if it did not cause too much additional work' a file concerning a complaint the Applicant made against another person, noting the file should not be 'very large' (the **complaint file**). These two categories are points 3 and 4 in the request.

Agency's letter providing documents outside the FOI Act dated 21 March 2019

10. By letter dated 21 March 2019, the Agency wrote to the Applicant regarding the investigation and provided 196 pages of documents outside the FOI Act to assist the Applicant in responding to the Agency's preliminary view letter. The Agency's letter noted documents the Applicant would have as they were exchanged between the Agency and the Applicant in relation to the investigation and that also fell within the terms of the request.

Applicant's email dated 28 March 2019

11. By email dated 28 March 2019, the Applicant wrote to the Agency acknowledging receipt of the documents released outside the FOI Act and reduced the scope of their request to the audit file and complaint file referred to above.

Agency's letter dated 3 April 2019

12. By letter dated 3 April 2019, the Agency wrote to the Applicant requesting confirmation of the terms of their rescoped FOI request.

Applicant's letter dated 9 April 2019

13. By letter dated 9 April 2019, the Applicant wrote to the Agency advising they were not satisfied with the documents released outside the FOI Act as 'I am not convinced that I have been provided with all the material'. Therefore, the Applicant advised they maintain their original request for the 'complete' investigation file referred to above and the audit file and complaint file.

Agency's decision letter dated 1 May 2019

14. By letter dated 1 May 2019, the Agency wrote to the Applicant notifying of its decision to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(1), as the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Review application

15. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
16. As no agreement was reached between the Agency and the Applicant as to rescoped terms for the request, my task on review is to review whether the requirements for section 25A(1) are met in relation to the scope of that original request.
17. However, in an attempt to informally resolve the matter during the review, OVIC staff communicated with both the Applicant and the Agency. This resulted in the Applicant being advised they may submit a separate FOI request for the complaint file, which corresponds to point 3 in their request as the Agency advised the work in processing a request for these documents would not be subject to refusal under section 25A(1).
18. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

19. I have considered all communication and submissions received from the parties, including:
 - (a) correspondence between the Applicant and the Agency as part of the section 25A(6) consultation process;
 - (b) the Agency's decision on the original FOI request;
 - (c) the Applicant's submission provided with their review application;
 - (d) the Agency's submission; and
 - (e) communications between OVIC staff with the Agency and the Applicant.
20. 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.

Section 25A(1)

21. Section 25A(1) is an exception under the FOI Act that provides an FOI request may be refused in certain circumstances following an agency consulting with an applicant in accordance with section 25A(6).
22. Section 25A 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.

...

- 23. In *Secretary, Department of Treasury and Finance v Kelly*,¹ the Victorian Supreme Court of Appeal 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...

- 24. 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
- 25. 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.³
- 26. In reviewing the Agency's decision, I am required to consider whether the requirements of section 25A are satisfied at the time of my review. That is, whether at the time of my decision, processing the request would substantially and unreasonably divert the Agency's resources from its other operations.⁴

Review of the application of section 25A(1)

- 27. In my review of this matter, I first consider whether processing the original request would involve a substantial diversion of the Agency's resources, and secondly whether processing the request involve an unreasonable diversion of the Agency's resources.

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

Consultation requirements under section 25A(6)

28. A decision to refuse a request under section 25A(1) cannot be made unless an agency gives notice to an applicant in accordance with section 25A(6). The agency must notify the applicant of its intention to refuse the applicant's request and nominate an agency officer with whom the applicant can consult, provide a reasonable opportunity for the applicant to consult and lastly, provide information to assist the applicant in amending their request with a view to removing the proposed ground for refusal.⁵
29. I am satisfied the Agency's consultation letter dated 26 February 2019 provided the required notice to the Applicant of the Agency's intention to refuse to grant access to the documents, provided a reasonable opportunity for the Applicant to consult with an Agency officer and provided sufficient information to assist the Applicant in rescopeing the request with a view to removing the proposed grounds for refusal.
30. Accordingly, 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 original request, I must complete my review based on the applicant's original request.
31. In this case, where the Agency and Applicant did not reach agreement following consultation under section 25A(6), my review concerns the request, as made on 25 January 2019. Namely, whether, at the time of my decision, processing the 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?

32. When determining the resources that would be required by an agency in deciding whether to refuse access under section 25A(1), the Victorian Civil and Administrative Tribunal (**VCAT**) observed in *McIntosh v Victoria Police*:⁶

...in asserting section 25A, an agency cannot be obliged to specify exactly how much time and energy would be spent by the agency in processing the request. Estimates only are acceptable, as to ensure precision would mean the agency would have to do the very work that section 25A is designed to prevent.

33. In summary, the Agency made the following submission in relation to processing the Applicant's request and responses following further enquiries made by OVIC staff with the Agency:
 - (a) 'The VLSC conservatively estimates the volume of documents falling within the terms of the amended request is 6640 documents comprising documents in both digitised and electronic form'.
 - (b) The estimated volume of documents for point one of the request is 4000 pages (not including the 195 pages released to the Applicant outside the FOI Act on 21 March 2019).
 - (c) Processing the request would involve searches for hard copy and electronic documents in the following areas of the Agency: Records Management Department; Information Technology; all records/filing areas within the office; and external providers that store documents.
 - (d) The Agency does not have an FOI unit. It has six staff who are authorised to deal with FOI matter. Each of these staff are engaged on other duties, including two part time and four full

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

⁶ [2008] VCAT 916 at [11].

time staff who are 'handling significant caseloads of matters under the Legal Profession Uniform Law. The FOI matters that they handle are an add-on to their normal work'.

- (e) If the Agency processes the request, it would only be able have one Agency officer work on the request for five hours each week to allow for them to undertake their other duties and the processing of other FOI requests the Agency has on hand. The Agency estimates the request would take 553 hours or a total of 110 weeks to process the request.
 - (f) It would take the Agency officer an estimate of 15 hours to search for documents excluding additional time to remove duplicate documents. This means document searches would take three weeks.
 - (g) Given the subject matter of the request, the Agency would be required to consult with third parties to determine their views about disclosure of documents. It would take an Agency officer an estimate of six hours to consult with relevant third parties.
 - (h) Assessing documents in accordance with the FOI Act would take an Agency officer an estimate of in excess of 553 hours.
 - (i) At the time of my decision, the Agency has six FOI requests on hand.
34. On the information before me and given the estimated large number of documents relevant to the Applicant's request, in particular his request for the completed investigation file (point 1), I accept the time required for the Agency to undertake a thorough and diligent search for documents falling within the terms of the request, to assess those documents and consult with third parties (assuming all such consultation would be practicable) would involve a substantial diversion of the Agency's resources from its other core operations.
35. It is therefore necessary for me to consider whether the diversion of resources would be 'unreasonable' in the circumstances.

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

36. The meaning of 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, Local Government and Community Services*, in which the Commonwealth Administrative Appeals Tribunal held:

... it is not necessary to show ... that the extend 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.

37. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the approach adopted by VCAT in *The Age Company Pty Ltd v CenITex*.⁷
38. Based on the information before me at the time of my decision, 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 practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort.

I am satisfied the terms of the request are sufficiently precise to enable the Agency to locate the documents sought by the Applicant.

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

However, I do not accept the time taken to undertake the document searches would be unreasonable given the specific nature of the documents requested (ie the request relates to files held by the Agency rather than individual documents) and the reasonable likelihood the Agency, which is a statutory regulator of registered lawyers, has a sufficiently sophisticated system for in the management and storage of its current and past hard copy and electronic documents and files.

(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 agencies 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'.⁸

However, in *Mildenall v Department of Education*,⁹ VCAT held:

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

I acknowledge the Applicant's strong personal interest in seeking access to the documents, as set out in his communications to the Agency and OVIC. 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. Nor am I satisfied the Applicant's personal interest in the documents outweighs the public interest in the Agency not being diverted from its core operations due to the large scope of the request. In this regard, I have also given consideration to the documents released to the Applicant by the Agency outside the FOI Act following the Applicant's request that it do so to allow the Applicant to adequately respond to the Agency's preliminary view.

(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 request, it had eight FOI matters on hand, which is a larger number than usual for the Agency to process at one time. The Agency indicated it usually processes approximately 15 FOI requests annually. At the time of my decision, the Agency has six FOI requests on hand.

The Agency further advised it has six staff members, two part time and four full time, responsible for processing FOI requests and who have other duties. The Agency specifically stated, 'We currently have 6 [six] staff who are authorised to deal with FOI matters, all of whom are engaged on other duties... handling significant caseloads of matters... The FOI matters they handle are an add-on to their normal work'.

As stipulated above, the Agency advised its FOI officer, who is responsible for the Applicant's request, has other duties and would only be able to process the request for an hour per day. Hence, the Agency estimates it would take that officer 110 weeks to complete 553 hours of work.

⁸ Section 3(1).

⁹ (unreported, VCAT, 19 April 1999) at [30].

On the information before me, I am satisfied the request, particularly given the Applicant seeks access to the complete investigation file, is not a reasonably manageable one in the context of the Agency's size and resources available for dealing with FOI applications.

- (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 the Agency's consultation letter dated 26 February 2019. I am satisfied the Agency's initial assessment of the request was reasonable, particularly given the Applicant seeks access to the complete investigation file, which the Agency estimates comprises more than 4000 pages.

I note the request arose in the context of an Agency investigation into the Applicant's legal practice and enabling the Applicant to respond to the Agency's preliminary view. I consider these circumstances are reasonably likely to cause the Applicant a certain measure of concern that may impact upon their approach to an FOI consultation process with the Agency.

Having reviewed correspondence between the Applicant and the Agency, in the circumstances, I am satisfied the Applicant took a reasonably cooperative approach in attempting to redraw the boundaries of the request. However, in light of continuing concerns about the amount of information released by the Agency outside the FOI Act, the Applicant elected to maintain their request for the complete investigation file. While the Applicant had a right to do so, I consider had they been willing, for example, to rescope their request as suggested by the Agency, this may have allowed the request to be processed, rather than refused.

I also note the Agency and Applicant's willingness to cooperate with OVIC staff during the early resolution process, which resulted in the Applicant advising of their intention to submit an FOI request for point 3 in their request.

- (e) The statutory time limit under the FOI Act for making a decision.

Based on the Agency's estimate of the work required to process the request, the number of FOI requests the Agency has on hand, and the resources available to the Agency to process FOI requests, while noting the extension of time provisions available under section 21, I consider it would be reasonably likely the Agency would be unable to process the request and make a decision within the statutory timeframe limit.

39. Having considered the above factors, I am satisfied the diversion of Agency's resources would be unreasonable in this matter.

Conclusion

40. 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.
41. Accordingly, I have decided to refuse to grant access to the documents in accordance with the Applicant's request made on 25 January 2019 under section 25A(1).
42. Despite my decision, it is open to the Applicant to make a new FOI request to the Agency with a reduced scope. In doing so, the Applicant is encouraged to consider reducing the scope of any new request to potentially avoid the Agency again applying section 25A(1). For example, the Applicant could limit the requested date range or specify certain documents or types of documents [they seek], or exclude documents [they have exchanged with the Agency].

Review rights

43. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
46. 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.
47. 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.¹³

When this decision takes effect

48. 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.

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).