

## Notice of Decision and Reasons for Decision

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Applicant:	'AS3'
Agency:	Victoria Police
Decision Date:	15 November 2019
Provision considered:	Section 25A(1)
Citation:	'AS3' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 166 (15 November 2019)

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FREEDOM OF INFORMATION – 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.

I have decided to refuse to grant access to the documents in accordance with the Applicant's FOI request under section 25A(1) on grounds I am satisfied the work involved in processing the Applicant's FOI 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

15 November 2019

## Reasons for Decision

### Background to review

1. The Applicant, through their representative, made a request to the Agency for access to the following documents:
  1. All documents, papers, diary and note book entries, emails, external CCTV, video or audio files, running sheets, correspondence, investigation records, LEAP records, statements, property book records, interviews and things relating to Victoria Police investigation file [file number].
  2. All affidavits, documents, papers, diary and note book entries, emails, video or audio files, running sheets and things relating to Victoria Police Listening Device applications naming said applicant [name], [rank] [registered number] inclusive of any requests to external agencies.
  3. All affidavits, documents, papers, diary and note book entries, emails, video or audio files, running sheets, and things relating to Victoria Police Telephone Intercept applications naming said applicant [name], [rank] [registered number] inclusive of any requests to external agencies.
  4. All documents and things relating to requests to external agencies for Listening Devices naming said applicant [name].
  5. All documents and things relating to requests to external agencies for Telephone Intercepts naming said applicant [name].
  6. The Final Investigation Report [file number].
2. By letter dated 29 July 2019, the Agency wrote to the Applicant in accordance with section 25A(6) notifying the Applicant it intended to refuse the request 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. The Applicant was invited to consult with the Agency with a view to removing the proposed ground of refusal by refining the scope of the request.
3. The Applicant declined to consult with the Agency and did not refine the scope of the request.
4. In its decision letter of 16 August 2019, the Agency advised the Applicant it had determined to refuse the request under section 25A(1).

### ***Previous FOI request made by the Applicant***

5. I note this is the Applicant's second request made to the Agency.
6. The Applicant's prior request was made in the exact same form as the current request.

The Applicant also declined to consult with the Agency and did not refine the scope of the previous request. Accordingly, in a decision letter dated 13 March 2019, the Agency advised the Applicant it had 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 considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application and the Applicant's submission dated 7 and 24 October 2019; and
  - (c) correspondence received from the Agency on 30 August, 11 September and 4 November 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.

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

11. Section 25A provides:

**25A Requests may be refused in certain cases**

- (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 the office of the Minister; 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.
  - ...

12. In *Secretary, Department of Treasury and Finance v Kelly*,<sup>1</sup> the Victorian Supreme Court of Appeal described the purpose of section 25A(1):

...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 unreasonably disruption to the day to day workings of the government through its agencies...

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

13. 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 process the request. To require the issue be determined with absolute certainty would compel the agency to undertake the very work section 25A(1) is designed to avert.<sup>2</sup>
14. 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>
15. I am required to consider whether section 25A(1) applies at the time of review. That is, I must assess whether 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 made its decision to refuse to process the request.<sup>4</sup>

### ***Consultation by Agency with the Applicant***

16. Section 25A(6) provides:

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 or a member of staff of the Minister 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. I have reviewed the Agency's notice of intention to refuse access dated 29 July 2019.
18. I have also reviewed the Agency's notice of intention to refuse access and decision in relation to the Applicant's prior request.
19. I am satisfied the Agency provided the Applicant with 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 grounds for refusal.
20. During the course of this review, the Applicant was provided a further opportunity to narrow the scope of their request. The Applicant declined to reformulate their request.

### ***Would processing the request involve a substantial and unreasonable diversion of the Agency's resources?***

21. The words 'substantially' and 'unreasonably' are not defined in the FOI Act.

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<sup>2</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

<sup>3</sup> *Ibid* 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 and Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

22. In *McIntosh v Police*,<sup>5</sup> the Victorian Civil and Administrative Tribunal (VCAT) stated:
- ... essentially I take these words not to require overwhelming proof of difficulty, and to allow some latitude to the Respondent, given that the difficulty of the process can only be estimated, not proven.
23. The Tribunal went on to observe while precision is not required, the respondent in that case had not ‘grappled with the question of what time and resources would reasonably be involved’,<sup>6</sup> concluding there was ‘no credible evidence of a large or unreasonable workload being generated by the request’.<sup>7</sup>
24. The Agency submits the following with respect to the time and resources that would be reasonably involved in processing the request:
- (a) a preliminary search for the documents requested identified over 800 pages matching the terms of the Applicant’s request;
  - (b) there are seven FOI staff who are able to undertake the assessment of the documents requested;
  - (c) there are approximately 457 other FOI requests requiring processing by FOI staff; and
  - (d) an estimate of the time and effort required to process the request cannot be provided:

... the time to read, assess and redact the documents would be very lengthy indeed – many multiple hours. At present it is too difficult to calculate.
25. Furthermore, the Agency and the Applicant have provided a significant amount of contextual information relating to the documents requested. Having considered this information, I am satisfied there would be matters of complexity and sensitivity for the relevant Agency officer to consider when assessing the documents and consulting with relevant third parties. This would likely increase the time involved in processing the request.
26. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the approach adopted taken (sic) in *The Age Company Pty Ltd v CenITex*.<sup>8</sup>
27. 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 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.
  - (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. I acknowledge the Applicant holds a strong personal interest in the documents.

While I accept the Applicant has a personal interest in obtaining access to the documents, on the information before me, I do not consider there is a broader public interest in disclosure [of] the documents.

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<sup>5</sup> (Vic) [2008] VCAT 916 at [21].

<sup>6</sup> *Ibid*, at [29].

<sup>7</sup> *Ibid*, at [26].

<sup>8</sup> [2013] VCAT 288 at [43] – [45].

(c) Whether the request is reasonably manageable

I accept the Agency has a current case load of 457 FOI requests and this number is not static in that the Agency receives and finalises multiple FOI requests on any given day. I consider 457 current FOI requests to be a large number awaiting finalisation by the Agency's FOI unit.

On the information before me, I do not consider the Applicant's FOI request to be reasonably manageable in the context of the Agency's limited resources and the current wording of the Applicant's request.

(d) The reasonableness of the Agency's initial assessment, and whether the Applicant has taken a cooperative approach to redrawing the boundaries of the application

The Applicant, via their representative, determined not to revise the scope of the request, stating:

We are in receipt of your correspondence dated 29 July 2019 and indicate to you that the member does not wish to consult nor [do they] wish to redefine [their] request in a form that is capable of being processed.

[They] do not accept your reasoning for considering a refusal to accommodate [their] request and seeks immediate attention to [their] application.

The Applicant submits:

The claim of the application being a substantial and an unreasonable diversion of resources in this matter is overstated. The 800 or so pages purported to be in existence would largely sit on IT databases: Interpose, the intelligence and investigation management system, and [name of database], PSC's internal investigation database. (Some material may be duplicated across both systems).

Accessing this material is a simple matter:

1. Log into the [name of database] database
2. Enter the relevant file number [file number]
3. Open relevant folders
4. Print screen

[Database] would contain a related investigation name or 'shell' on the Interpose database ... Each operation name is specific for each investigation and contains a brief description... Each Victoria Police workgroup that uses Interpose will have their own 'Security Group' (private sections). PSC may have many security groups which may be covert, that is hidden and not accessible by the broader organisation for obvious reasons.

Accessing this material is a simple matter:

1. Log on to the Interpose Database
2. Enter the relevant investigation name (i.e. Operation [name])
3. Operation [name] will contain a number of sub-folders
4. Open each folder and select 'print'

Printing one and a half reams of paper is not a substantial and unreasonable diversion of resources as it can be done by one person at one computer. It is acknowledged that this one person will have to walk to and from the printer, which in itself is not unreasonable. To entertain any reduction in the scope would allow for the ongoing evasion of scrutiny, accountability and the ongoing cover-up of [named person]'s conduct. Absolute power corrupts absolutely and things only change when dark places are illuminated.

I note the Agency's correspondence dated 29 July 2019 states processing the request involves 'copying, viewing and assessing the documents'.

On the information before me, I am satisfied the Agency responded reasonably to the Applicant's request, including providing the Applicant with an explanation of the work involved in processing the request and provided a reasonable opportunity for the Applicant to revise the scope of the request.

However, having reviewed correspondence between the Agency and the Applicant in this case, I am of the view it would have been preferable if the Agency had provided the Applicant and/or [their] representative with guidance or practical suggestions as to how the request could be refined with a view to being able to remove the proposed ground of refusal and proceed to processing the request. I consider the FOI Act contemplates an agency will provide reasonable assistance of this nature to an applicant in order that the object of the FOI Act be met.

In turn, an applicant in receipt of reasonable assistance provided by an agency in the task of rescoping an FOI request would also be encouraged to approach such guidance and suggestions with an open mind. In this case, however, the Applicant elected to decline to rescope their request during the consultation and this review.

(e) The statutory time limit for making a decision

Due to the work required to process the request and the Agency's limited resources, I accept it would be difficult for the Agency to process the request within the statutory timeframe under section 21, and that processing the request would be reasonably likely to interfere with the Agency's other operations.

I acknowledge it is open to an Agency and Applicant, where appropriate, to negotiate an extension of time to make a decision. Where possible, this may assist in making a request reasonable to process.

28. Having weighed up the above factors, on balance, I am satisfied processing the Applicant's FOI request would substantially and unreasonably divert the resources of the Agency from its other operations

**Conclusion**

29. On the information before me, I am satisfied the work involved in processing the Applicant's FOI request would substantially and unreasonably divert the resources of the Agency from its other operations.
30. Accordingly, I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(1).

**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>9</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>10</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>11</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>12</sup>

**When this decision takes effect**

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

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

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.