

Notice of Decision and Reasons for Decision

Applicant:	'AT1'
Agency:	Victoria Police
Decision Date:	22 November 2019
Exemptions considered:	Section 25A(1)
Citation:	'AT1' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 173 (22 November 2019)

FREEDOM OF INFORMATION – police records – refusal to process an FOI request – substantial and unreasonable diversion of 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
22 November 2019

Reasons for Decision

Background to review

1. In April 2019, the Applicant, through their legal representative, made a request to the Agency for access to:

[named person and date of birth]: all police statements, interview notes and recordings, photographs, charge sheets, outcomes of hearings, LEAP records, summaries and briefs of evidence in relation to alleged assaults and/or family violence perpetrated against or involving [the Applicant].
2. According to the Applicant's legal representative, the above request was originally lodged via post with the Agency in January 2018 and no response was received.
3. By letter dated 6 June 2019, the Agency wrote to the Applicant advising it intended to deny access to the 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 remove the proposed grounds for refusal by refining the scope of the request so it could be processed. The Agency recommended the Applicant limit the scope of their request to a list of involvements from the Law Enforcement Assistance Program database relating to the Applicant.
5. The Applicant did not narrow the scope of their request within the relevant timeframe.
6. In its decision, the Agency decided to refuse to grant access to the documents in accordance with 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. As noted above, the Applicant's legal representative claimed the request in question was originally submitted to the Agency in January 2018. This issue was raised with the Agency during the review. The Agency advised it did not receive an FOI request from the Applicant in 2018. The Agency submits the Applicant's request was received on 26 April 2019 in a letter dated 24 April 2019, which was accompanied by a copy of a request dated 17 January 2018. The Agency noted this issue was not addressed in its correspondence with the Applicant's legal representative while processing the request due to an administrative oversight.
10. I have considered all communication and submissions received from the parties, including:
 - (a) the Agency's decision on the request;
 - (b) correspondence from the Agency to the Applicant leading up to its decision;
 - (c) the Applicant's request for review dated 23 July 2019 and information provided in support of the application for review; and
 - (d) the Agency's submission dated 6 November 2019.

11. 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)

12. Section 25A(1) provides a basis for refusing an FOI request in certain circumstances following consultation by an agency with an applicant in accordance with section 25A(6).
13. 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... 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.

14. In *Secretary, Department of Treasury and Finance v Kelly*,¹ the Victorian Supreme Court of Appeal held:

... 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 ...

15. The words 'other operations' in section 25A(1) include 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 an applicant's FOI request.²
16. Once an agency decides to refuse to grant access to a request under section 25A(1), it bears the onus of establishing it has met the requirements of the provision. Namely, processing the request would substantially and unreasonably divert the resources of the agency from its other operations.³

Review of the application of section 25A(1)

17. 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 request would both substantially and unreasonably divert the Agency's resources from its other operations.⁴

Consultation under section 25A(6)

18. 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 request, 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
19. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access, provided a reasonable opportunity for the Applicant 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.
20. In this instance, the Applicant did not refine the scope of their request. Therefore, my review is based on the terms of the Applicant's request dated 23 July 2019.

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.

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

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

21. 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.

22. I have considered the Agency's consultation letter, decision letter and submission which provided information on the estimated number of documents relevant to the Applicant's request, the steps and number of Agency staff searching for documents and processing of documents would require, and the Agency's available resources to process the request and current workload.
23. The Agency advised that, while it could not give a definite number of documents or timeframe for processing, it estimated the final number of pages would be significant, above 200 pages, and multiple staff would be required to undertake numerous hours of work to locate, access and then redact relevant documents.
24. On the information before me and given the large scope of the Applicant's request, which includes police statements, interview notes and recordings, photographs, charge sheets, outcomes of hearings, LEAP records, summaries and briefs of evidence, I am satisfied the time required for the Agency to undertake a thorough and diligent search for relevant documents, and to identify and assess those documents, would involve a substantial diversion of the Agency's resources from its other operations.

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

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

26. In *The Age Company Pty Ltd v CenITex*,⁸ VCAT considered the following factors in deciding whether the diversion of the agency's resources from its other operation would be unreasonable. I consider these factors are relevant in this matter as discussed 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.

I consider the terms of the request were sufficiently precise to enable the Agency to locate the documents sought by the Applicant.

⁶ [2008] VCAT 916 at [11].

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

⁸ [2013] VCAT 288 at [43]-[45].

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

Members of the public have a right to access official documents unless there is a compelling reason to refuse access. I accept the Applicant has a strong personal interest in the documents, as they are sought to support an application to the Victims of Crime Assistance Tribunal.

While the subject matter of the request is important to the Applicant, I do not consider there is a broader interest shared by the public that would be served by disclosure of the documents in this matter.

- (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.

I accept the Agency's FOI unit was dealing with 386 FOI requests at the time of its decision and consider this is a large number of requests awaiting finalisation. I note this number is not static given the total number of requests the Agency receives during a calendar year.⁹

I also accept the Agency's advice it currently has seven officers who are able to process the request and at the time of this decision, the Agency has 444 active FOI files.

In its submission the Agency advised it located 18 Law Enforcement Assistance Program (LEAP) Incident Reports of 75 pages and brief of evidence of 35 pages in a preliminary search, spanning a period of 12 years, involving 16 Agency officers now located at eight separate stations.

In its decision letter, the Agency estimated relevant Agency officers would 'require a minimum of eight hours to search and collate the relevant documents'. Accordingly, I am satisfied the estimated total search time is 128 hours.

The Agency advised in its submission:

It would involve a lengthy time for a VPS2 to contact each station and each member identified (then to locate the documents specified by class in the second part of the applicant's request) – likely that quite a number of hours to contact each individual and then to have them search back over a number of years for said documents. After such a lengthy time, some may have been destroyed or archived.

Once located, the documents would need to be assessed. Not clear how many there would be, but if we have 18 LEAP reports/incidents then presumably we would multiply that by those classes of documents named by the applicant... So expectation is that the final number of pages would be significant.

I am satisfied there are nine classes of documents requested by the Applicant. Therefore, it is estimated there is likely to be over 200 pages subject to review.

The Agency advised consultation with third parties would not be practicable given the documents concern family violence. However, I consider consultation with Agency officers would likely be practicable in the circumstances.

Further, the Agency advised it would also need to consider the following when assessing whether any of the exemptions under the FOI Act apply:

... assessing would need to take into account outcome of the incidents – which proceeded to court which resulted in [briefs of evidence] not being authorised. Which matter resulted in acquittal, which had charges withdrawn or struck out – and, if there were any outcomes, did they result in convictions, CCOs, suspended sentence... - which affects what information we can and cannot release

⁹ In the financial year, the Agency received 3991 FOI requests (Source: *OVIC 2018-19 Annual Report* available at www.ovic.vic.gov.au).

Based on the information before me and as set out above, I consider the Agency provided sufficient information about its current workload and resources to demonstrate the work involved in processing the request would impact upon the Agency's ability to complete its current 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 exchanged between the Agency and the Applicant prior to the Agency's decision to refuse the Applicant's request.

The Agency's consultation letter, dated 6 June 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 from the Applicant by 4 July 2019.

On 5 July 2019, the Applicant sought an extension of time to provide a response.

The Agency agreed to an extension until 12 July 2019.

On 16 July 2019, following no response received from the Applicant, the Agency determined to refuse the request in accordance with section 25A(1).

In its submission provided to OVIC, the Applicant advised:

...our original request was reasonable and should be considered in light of the significant offences perpetrated against our client, and further that our client has a right to those documents under the [FOI Act].

Should the documents be released as only [LEAP] reports, as requested by [the Agency] in correspondence, we will not be able to provide substantial information the Victims of Crime Assistance Tribunal needs to make a determination.

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

During the review, the Applicant was agreeable to lodging a new FOI request to the Agency in accordance with the suggested narrowed terms. However, the Applicant wished to proceed with their review application in relation to the terms of their original request.

I am satisfied the Agency responded reasonably in response to the Applicant's request, by providing a reasonable opportunity for the Applicant to revise the scope of 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 on this application

The Agency was not able to provide a definitive timeframe in which it would be able to process the Applicant's request.

Due to the work required to process the Applicant's request, the current number of requests the Agency has on hand and the resources available in the Agency's FOI unit, I consider it would be difficult for the Agency to process the request within the statutory timeframe under section 21 of the FOI Act and that processing the request would likely interfere with the other operations of those areas.

27. Having considered the above factors, I am satisfied processing the request would involve an unreasonable diversion of the Agency's resources.

Conclusion

28. On the information before me, I am satisfied the work involved in the Agency processing the Applicant's request would substantially and unreasonably divert the current resources of the Agency from its other operations, including the processing of other current FOI requests.

29. Accordingly, I have determined to refuse to grant access to the documents in accordance with the request under section 25A(1).
30. 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

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.¹⁰
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
34. 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.
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.¹³

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.

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).