

Notice of Decision and Reasons for Decision

Applicant:	'AW9'
Agency:	Department of Education and Training
Decision date:	19 December 2019
Provision considered:	Section 25A(1)
Citation:	'AW9' and Department of Education and Training (<i>Freedom of Information</i>) [2019] VICmr 208 (19 December 2019)

FREEDOM OF INFORMATION – disputes and complaints – refusal to process an FOI request – substantial and unreasonable diversion of Agency resources from its other operations – correspondence from agency

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 determined to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(1) on grounds 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.

Sven Bluemmel
Information Commissioner

19 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - i. Any correspondence (including file notes, diary notes, emails, letters, minutes of meetings, budgets) between the Principal of [named] Primary School and the finance sub-committee for the period between [date] until now.
 - ii. Any correspondence (including file notes, diary notes, emails, letters) of [named person] with respect to the performing arts levy for [year] and [year].
 - iii. Any correspondence (including file notes, diary notes, emails, letters, Same Time transcripts) between [named person] and [named person] in relation to Federal Member for [political party] and/or any politician attending the school assembly at [named] Primary School for the period [date range].
 - iv. Any correspondence (including file notes, diary notes, emails, letters) of [named person] with respect to the fund-raising activity for the books during the middle of [year].
 - v. Any correspondence (including file notes, diary notes, emails, letters) of [named person] relating to the procurement and approval of FeastBox activities during [year] and [year].
 - vi. Any correspondence (including file notes, diary notes, emails, letters) between [named person], [Victorian School Building Authority] VSBA and the appointed architects working on the [named] Primary School refurbishment between the period [date] until now.
2. By email sent 18 June 2019, the Agency wrote to the Applicant stating it intended to deny access to 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.
3. The Applicant was invited to consult with the Agency in accordance with section 25A(6), with a view to removing the proposed ground of refusal by refining the scope of the request so it could be progressed.
4. The Applicant responded to the Agency by email on 22 June 2019, stating that Points 2 and 5 were their priority, and suggesting that the Agency progress the requests in tranches and waive any subsequent application fees for the remaining tranches.
5. By email on 28 June 2019 the Agency contacted the Applicant to confirm whether they wished to proceed with points 2 and 5 as their FOI request. No reply was received, and a follow-up email was sent to request confirmation of the request terms. No reply was received from the Applicant.
6. Consequently, the Agency issued its decision letter dated 10 July 2019 in which it advised consultation had not resulted in a narrowing of the scope of the Applicant's request and 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 have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the correspondence between the Agency and the Applicant leading up to its decision;
 - (c) the information provided with the Applicant's review application; and
 - (d) the Agency's submission dated 27 August 2019 and other correspondence received from the Agency in the course of the review.
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.

Refusal of a request under section 25A(1)

11. One of the 'exceptions' referred to in section 3, which sets out the object of the FOI Act, is section 25A(1).
12. Section 25A(1) provides that a request for documents may be refused by an agency in certain circumstances after consultation with an applicant in accordance with section 25A(6):
 - (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.

13. 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.

14. The Supreme Court of Victoria has held 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 the applicant's FOI requests.²
15. Once an agency refuses 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.³
16. In reviewing the Agency's decision, I am required to consider whether section 25A(1) applies as at the time of my review. That is, I must assess whether processing the FOI request now would substantially and unreasonably divert its resources from its other operations under section 25A(1) rather than when the Agency decided to refuse to process the request.⁴

Consultation requirements under section 25A(6)

17. A decision to refuse to deal with a request under section 25A(1) cannot be made unless the agency gives notice to an applicant stating its intention to refuse the request and nominates an agency officer with whom the applicant can consult, provides a reasonable opportunity for the applicant to consult and lastly, provided information to assist the applicant to assist them in amending their request to a form that would remove the proposed ground for refusal.⁵
18. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access to the documents, provided a reasonable opportunity for the Applicant to consult and provided sufficient information to assist the Applicant in making their request in a form that would remove the proposed grounds for refusal.

¹ [2001] VSCA 246 at [48].

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

³ [2001] VSCA 246 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.

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

19. 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 as set out at paragraph 1 above.

Review of the application of section 25A(1)

20. In my review of this matter I must determine whether processing the Applicant's request represents both a substantial and unreasonable diversion of Agency resources in the circumstances.

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

21. When determining whether to refuse an FOI request under section 25A(1), it is only possible for an agency to estimate how much time and effort would be sent to process the request. 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 submission, dated 27 August 2019, regarding the initial search conducted, estimated time/effort required to identify documents relevant to the Applicant's request and the Agency's available resources and workload at that time, as summarised below:

As at 27 August 2019, the FOI Unit has five full-time and two part-time FOI officers and:

- Was processing 33 FOI requests;
- Had 16 Victorian Information Commissioner complaints and reviews to respond to;
- Had 10 matters before VCAT; and
- Had one matter before the Court of Appeal, Supreme Court of Victoria.

The FOI Unit undertook a preliminary search for documents with [named] Primary School and the [named] Region. It was estimated the request, would take administrative staff approximately two weeks to retrieve and provide documents to the FOI Unit. The [named] Primary School's administrative staff are responsible for [the school's] general administration, enrolment data entry, human resources and leadership duties. Accordingly, diverting them to processing the Applicant's FOI request for a period of 2 weeks would dramatically affect the normal operation of the [named school].

Furthermore, additional resources would need to be deployed by the Department's FOI Unit once relevant documents were identified and provided to the FOI Unit. For example, the FOI Unit would be required to -

- Examine the documents, both for applicable redactions and relevancy of the documents to the terms of the request;
- Collate the documents;
- Consult with individuals contained in the documents; and
- Provide copies of documents to individuals, redacting information that did not relate

⁶ [2008] VCAT 916 at [11].

to their own personal affairs in order for them to provide informed consent regarding the release of their information to the Applicant.

As the FOI Unit is currently processing 33 other requests, deploying a single FOI Officer to complete this task would be unreasonable, as it would inevitably cause significant delay for processing other applicant's requests. This delay could lead to further complications for the Department, if other applicants then submit complaints to the Victorian Information Commissioner regarding the delay in processing of their requests.

23. The Agency further submitted that documents likely captured by points 1 and 3 of the Applicant's request would be stored on back-up media tapes, the restoration of which would require approximately twelve days' work by Agency staff outside the FOI Unit. In addition, the Agency advised that to process the Applicant's request in its entirety further searches with several other areas of the Department would be required which would additionally impact and divert other Agency business areas outside of the FOI Unit from their core functions.
24. On 11 December 2019, the Agency advised its FOI Unit currently comprises six full-time FOI officers and three part-time officers; however, noted its resourcing is to reduce substantially as at early January 2020 due to staff leave and permanent departures, meaning its FOI Unit will comprise three full-time and three part-time officers available to process FOI requests. Its current workload includes:
- 51 FOI requests;
 - 12 Victorian Information Commissioner complaints and reviews;
 - Seven matters before VCAT; and
 - Two matters before the Court of Appeal, Supreme Court of Victoria.
25. On the information before me, I am satisfied the time required for the Agency to undertake a thorough and diligent search for all relevant documents, and to then identify, assess and undertake any required consultation regarding those documents, would involve a substantial diversion of the Agency's resources, both for the FOI Unit and other areas, from other core operations.

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

26. 'Unreasonableness' was considered by the Commonwealth Administrative Appeals Tribunal in *Re SRB and Department of Health, Housing, Local Government and Community Services*, in which the 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

I consider the following factors particularly relevant in the circumstances of this matter:

- (a) Whether the terms of 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

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].

Having considered the terms of the Applicant's request, as set out at paragraph 1, I am not satisfied they are sufficiently precise to enable the Agency to practicably identify and locate the documents sought within a reasonable time and exercising reasonable effort. In particular, points 1 and 6 of the request, are broad and cover a substantial period of time.

This finding takes into account the time and resources required to interrogate databases and systems, examine search results, and consult agency officers and other third parties as to documents identified.

(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 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'.⁹

However, in *Mildenall v Department of Education*,¹⁰ 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

Noting the subject matter of the request, I consider the Applicant has a strong personal interest in obtaining access to the documents. 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 in this matter. Nor am I satisfied the Applicant's personal interest in the documents outweighs the public interest in the Agency not being diverted from its other operations due to the broad ranging nature of the FOI request.

(c) Whether the request is reasonably manageable

I accept the Agency's FOI Unit has a current case load of over 50 FOI requests and that this figure is not static. I further note the FOI Unit's staffing is due to reduce imminently to comprise three full-time and three part-time officers available to process FOI requests.

I am satisfied the Agency has provided sufficient information about the complexity of the searches required to identify all documents relevant to the Applicant's request and the impact of this work on Agency resources. This includes, but is not limited to, Agency staff outside of the FOI Unit identifying relevant documents, and restoring back-up media tapes. I note the Agency's estimate that each of these initial tasks would take separate business unit staff approximately two weeks to complete. I note further this estimate does not include subsequent time for the FOI Unit to undertake additional searches with other Agency business units for relevant documents and to assess/consult on all information identified before making its decision.

Based on the time estimates, as well as a detailed summary of the resources available to the Agency, I am satisfied the work involved in processing the Applicant's request would significantly impact upon the ability of the FOI Unit to process other FOI requests, and would also divert other Agency staff from their core operations. As such, I am not satisfied the request is a reasonably manageable one.

⁹ Section 3(1).

¹⁰ (unreported, VCAT, 19 April 1999) at [30].

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

I have reviewed the correspondence between the Agency and the Applicant sent prior to the Agency's decision to refuse to process the request.

As stated in paragraphs 2 – 6 above, the Applicant's lack of response to Agency consultation was taken to not be agreement to amend or narrow the scope of the original request.

I am satisfied the Agency responded reasonably to the Applicant's request, by providing a reasonable opportunity for the Applicant to revise the request, and by providing suggested terms for a refined request that would allow the Agency to process the request.

- (e) The statutory time limit for making a decision

Based on the Agency's estimate of the work required to process the Applicant's request, the number of FOI requests the Agency has on hand, and the resources available both to the FOI Unit and the various business units required to conduct document searches, 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 operations of those other Agency areas.

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

Conclusion

29. I have determined to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(1) on the grounds I am satisfied the work involved in processing the Applicant's request would substantially and unreasonably divert the resources of the Agency from its other operations.
30. I note in the course of this review the Agency informed my office that the Applicant has made a separate FOI request to the Agency for information relating to points 2 and 5 of their 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.¹¹
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
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.¹⁴

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).

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.