

Notice of Decision and Reasons for Decision

Applicant:	'AX6'
Agency:	Department of Environment, Land, Water and Planning
Decision Date:	19 December 2019
Provisions considered:	Sections 25A(1), 19
Citation:	'AX6' and Department of Environment, Land, Water and Planning (Freedom of Information) [2019] VICmr 214 (19 December 2019)

FREEDOM OF INFORMATION – Action to Control Wildlife – wildlife management – application forms – permits to control kangaroos and wallabies – public land – refusal to grant access – 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.

In conducting my review, I have considered the Applicant's FOI request concerns two categories of documents.

In relation to the first category of documents, I have determined to refuse to grant access to the documents in accordance with the 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.

In relation to the second category of documents, I am satisfied no discrete document exists and it is not possible for the Agency to produce a document in accordance with section 19. In these circumstances, the FOI Act does not require the Agency to create a relevant document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

19 December 2019

Reasons for Decision

Background to review

1. On 3 September 2019, the Applicant made a request to the Agency for access to the following documents:

Application forms and permits issued to kill kangaroos and wallabies on land managed by Parks Victoria from January 2014 to present (when final decision is made on this FOI). Documents detailing number of kangaroos and wallabies killed on land managed by Parks Victoria (including gender and joeys) from Jan 2014 to present (when final decision is made on this FOI).

2. By email dated 6 September 2019, the Agency wrote to the Applicant advising it proposed to refuse to grant access to the documents sought 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 Agency advised the Applicant:

The department's system to record applications to control wildlife does not permit a search of organisations as an Authority to Control Wildlife (ATCW) is issued to a person rather than an organisation. In order to process your request, a manual search of all applications from January 2014 would need to be conducted in order to identify if it was issued to an employee or agent of Parks Victoria.

As an indication of the volume of applications that would require searching, during the period 2014-2018 (based on publicly available data of the department's website) there were approximately 18,900 ATCW issued. Of these, approximately 13,600 relate to kangaroos and wallabies.

...

Given the above volume, of applications that would need to [sic] manually searched, the department is satisfied that the work involved in processing your request would substantially and unreasonably divert the resources of the department from its other operations. ...

4. In accordance with section 25A(6), the Applicant was invited to consult with the Agency with a view to remove the proposed grounds for refusal.
5. By emails dated 12 September and 16 October 2019, the Applicant responded to the Agency, however, the consultation process did not lead to the terms of the FOI request being narrowed.
6. In its decision dated 28 October 2019, the Agency refused to grant access to the documents in accordance with section 25A(1) on grounds 'the volume of applications that would need to be manually searched' would substantially and unreasonably divert the resources of the department from its other operations. The Agency further noted 'the number of requests on currently on hand, and the resources available to [sic] department, it would not be possible for the department to complete the task within a manageable timeframe'.

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) correspondence between both parties during consultation conducted under section 25A(6);
 - (c) the Applicant's application for review dated 13 November 2019 and information the Applicant provided during this review; and
 - (d) the Agency's submission dated 25 November 2019 and information the Agency provided during this review.
10. In conducting my review, I have considered the Applicant's FOI request concerns two categories of documents, as follows:
- (a) a request for application forms and permits issued to control kangaroos and wallabies on land managed by Parks Victoria from January 2014 to present; and
 - (b) a request for documents detailing the number of kangaroos and wallabies controlled on land managed by Parks Victoria.
11. In relation the second category and following enquiries by OVIC staff, the Agency submits it:
- ...only holds information on the number of kangaroos and/or wallabies that are permitted to be controlled (not those actually controlled). This information is contained on the Authority to Control Wildlife that is issued...
- Parks Victoria may hold information on the number of kangaroos actually controlled but those documents, if they exist, would be in the possession of Parks Victoria.
12. Based on the information before me, I am satisfied there is no discrete document in existence detailing the number of kangaroos and wallabies controlled on land managed by Parks Victoria. Nor is it possible for the Agency to produce a document meeting the description of the document sought in accordance with section 19. In these circumstances, the FOI Act does not require the Agency to compile the requested data and manually create a relevant document.
13. Accordingly, my consideration of the Agency's application of section 25A(5) relates to the request for the first category, which concerns applications forms and permits issued to control kangaroos and wallabies on land managed by Parks Victoria from January 2014.
14. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Section 25A(1)

15. 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).
16. 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.

17. In *Secretary, Department of Treasury and Finance v Kelly*,¹ the Victorian 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 ...

¹ [2001] VSCA 246 at [48].

18. 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
19. 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)

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

Consultation requirements under section 25A(6)

21. A decision to refuse to process a request under section 25A(1) cannot be made unless an agency provides notice to an applicant stating its intention to refuse the 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 its request to a form that would remove the proposed ground for refusal.⁵
22. I am satisfied, before making its decision, the Agency provided the Applicant 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 its request in a form that would remove the proposed grounds for refusal.
23. Having reviewed correspondence between the Agency and Applicant following the Agency's invitation to consult under section 25A(6), I am satisfied the Applicant did not narrow the scope of its request.
24. During this review, OVIC staff made inquiries with the Applicant with a view of narrowing the scope of the request to remove grounds of refusal. However, in the absence of agreement from the Applicant to narrow the scope of the request, I must complete my review based on the Applicant's request as set out in paragraph 1 above.

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

25. 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.

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].

⁶ [2008] VCAT 916 at [11].

26. In support of its review application, the Applicant submitted the Agency previously published similar data regarding Authority to Control Wildlife (**ATCW**), as follows:
- (a) a document containing the 2017 Schedule for public land kangaroo control programs, which provides a breakdown of kangaroo control on various land controlled by Parks Victoria and states it 'will be updated regularly throughout the year, as required';⁷ and
 - (b) a document containing annual ATCW data for 2009 to 2018, which breaks down the species, number of ATCW's and the number of animals authorised for control.⁸
27. The Applicant submits:
- ...[the Agency] initially did this as part of their apparent commitment to transparency and for several years they published this exact data we are asking for on their website. So clearly they do have the capacity to be able to collate this data without considerable effort? Here is a link to their website where they have published the number of kangaroos authorised to be killed on public land across Victoria for 2017. They have also published previous years that were since removed and despite stating a commitment to be transparent in this regard, they have not published this particular data for two years.
28. In its submission, the Agency responded that manual searches would be required as the Agency records ATCW applications on its system once authorisation has been issued. Accordingly, to the Agency, to process the Applicant's request, a manual search of files held in multiple regional offices would be required to locate all applications relevant to the terms of the request.
29. Further, the Agency submits its system does not allow for specific multi-criteria searches. I note the Applicant's request has the following three criteria:
- (a) documents relevant to a specific timeframe, being 2014 to present;
 - (b) documents related to a specific organisation, being Parks Victoria; and
 - (c) documents related to specified species, being kangaroos and wallabies.
30. The Agency submitted that to process the Applicant's request and identify the specific information sought, 18,900 ATCW applications would need to be manually searched to identify:
- (a) whether the above applications relate to kangaroos or wallabies; and
 - (b) whether the ATCW was issued to an employee or agent of Parks Victoria, either by reference to the individual or the address where the control work was authorised to be undertaken.
31. However, given the number of State parks and reserves managed by Parks Victoria, the Agency submits it would not be able to identify whether the application was issued to Parks Victoria by the address of where the control work was authorised.
32. Further, the Agency estimated it would take regional staff between 1 and 5 minutes to examine each ATCW application. Given there are 18,900 ATCW applications, it is estimated the search time required for regional staff to locate documents relevant to this request would range between 315 to 1,575 hours.
33. On 6 December 2019, the Agency confirmed the current resources of the FOI unit:

⁷ 'Kangaroo population management', *Department of Environment, Land, Water and Planning* at <https://www.wildlife.vic.gov.au/__data/assets/pdf_file/0018/61830/Kangaroo-Management_Public-Land-Control-Program-2017.pdf>.

⁸ 'Authorities to Control Wildlife', *Department of Environment, Land, Water and Planning* at <https://www.wildlife.vic.gov.au/__data/assets/pdf_file/0016/113029/ATCW-Data_annual-data-2009-2018.pdf>.

- (a) the Agency is currently dealing with 57 FOI requests;
 - (b) since July 2019, the Agency has received a 60 percent increase in the number of FOI requests compared to the same period for the previous two years; and
 - (c) the FOI unit has five staff members, some of whom work part time.
34. I note the Applicant in its submission provided suggested search terms to locate the documents requested within the Agency's email system. However, on the information before me, I am satisfied the Agency will be required to conduct manual searches for documents relevant to the terms of the Applicant's request.
35. I am not satisfied the publication of similar information, outside of the FOI Act and within the Agency's ordinary operations, indicates processing the Applicant's request would not involve a substantial diversion of the Agency's resources.
36. Accordingly, I accept the time required for the Agency to undertake a thorough and diligent search for all relevant documents, and then 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?

37. '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.⁹

38. 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*.¹⁰

39. 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

Having considered the terms of the Applicant's request, I am satisfied they are sufficiently precise to enable the Agency to practicably identify and locate possibly relevant documents.

However, based on the number of documents and the particular information sought, I am not satisfied the Agency would be to locate the documents within a reasonable timeframe with the exercise of reasonable effort given the need to review each document to ensure it meets the terms of the Applicant's request, as set out in paragraph 9 above.

- (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

⁹ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹⁰ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

interests and the private and business affairs of persons in respect of whom information is collected and held'.¹¹

However, in *Mildenhall v Department of Education*,¹² VCAT held:

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

In support of its review application, the Applicant submits

[The Agency's] refusal to provide basic documents about the management of protected native wildlife in public parks is of great concern as is the fact that the public is not able to readily access basic documents such as permit application forms from and permits issued to another government department (Parks Victoria) in relation to its [sic] legislated management of protected native wildlife that is owned by the public and managed in trust by the government. Parks Victoria manages most public land in Victoria and the wildlife that resides inside this public land that is the property of the public. This is a huge responsibility they are entrusted by the public to do legally, ethically and transparently. We are aware of large scale culls of kangaroos authorised by the government in public land managed by Parks Victoria where tens of thousands of kangaroos have been killed and which are leaving our public parks void of these iconic native animals. Parks Victoria [sic] and the state government should be accountable and transparent to the Victorian public as to why, when and how many protected kangaroos and wallabies are being destroyed in our national parks and reserves.

In our opinion, both of these departments are very large departments that would have access to millions of tax payer dollars to maintain public records and electronic filing systems. This is essential so that protected native wildlife can be monitored and managed to ensure their conservation and welfare is protected, and that any decisions made to destroy our wildlife that lives on public land is in the public interest, as per their legal requirement under the Victorian Wildlife Act 1975. The public entrusts in the government and Parks Victoria to act in their best interests to protect the welfare and conservation of native wildlife and they have a responsibility to be accountable to the public so that we can be assured that they are abiding by the law, and therefore they need to be transparent in their management of our state's wildlife.

Further, the Applicant relies on the following publications in support of its view processing the request will provide for, and support the Agency's commitment to, transparency regarding ACTW:

- i. 'The Authority to Control Wildlife (ACTW) system review- Consultation Response Summary' published in 2018, which states:

We've heard the desire for greater transparency and availability of information

The submissions illustrated the importance of making information about the operation of the ATCW system available to the public. Not only does this respond to the keen interest in the system shown by many members of the public, it also demonstrates a willingness for DELWP to be accountable for the authorities it issues.

DELWP will continue to investigate the ways in which information could be better shared, while still complying with its obligations to respect the privacy rights of ATCW holders.

- ii. The Auditor General's 2012 report into the *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment*, which recommended the former Department of Sustainability and Environment:

¹¹ Section 3(1).

¹² (unreported, VCAT, 19 April 1999) at [30].

...should strengthen its management of wildlife and plant licences and permits by... accurately recording the number of licences, permits and authorisations it issues, and making this information publicly available...¹³

Noting the subject matter of the request, I acknowledge the Applicant's strong interest in obtaining access to the documents. I am also satisfied the public interest would be served by disclosure of the documents sought in this matter as there is significant public interest in the disclosure of information relating to the environment, in particular, the control and management of native wildlife on public land.

I also note the Agency has proactively released information of a similar nature, which is to be encouraged and is consistent with the objects of the FOI Act and the intention that information be disclosed outside the Act where appropriate to do so.

However, while I acknowledge the strong public interest factors that arise in relation to the Applicant's request, I must objectively assess the Agency's ability to process the request and consider the impact processing the FOI request would have on the Agency.

I am satisfied the scope of the request is such that processing the request involve an unreasonable diversion of the Agency's resources, which 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) The Agency's estimate as to the numbers of documents affected by the request, and by extension the number of pages and the amount of officer time, and the salary cost.

As detailed above, the Agency's regional staff would be required to conduct searches of the 18,900 ATCW issued during the elected timeframe, of which 13,800 are expected to relate to kangaroos and wallabies, to determine whether they are relevant to the terms of the Applicant's request. This is estimated to take between 315 and 1,575 hours to complete.

Based on the estimated number of documents relevant to the request, I accept the Applicant's request would represent a considerable burden for the Agency to process.

- (d) 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.

As set out above, I am satisfied the Agency provided sufficient information about the large number of documents estimated to fall within the terms of the Applicant's request, as well as its current FOI workload and resources. I accept this information demonstrates the work involved in processing the Applicant's request would significantly impact upon the ability of its staff to complete undertake their normal duties.

- (e) 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.

By email dated 9 December 2019, the Applicant submits it had unsuccessfully attempted to reduce the scope of its request in correspondence exchanged with the Agency between 23 April and 15 May 2019 in relation to a previous FOI request made on 9 April 2019 seeking access to 'all application, supporting documents, and permits issued to kill kangaroos on land managed by Parks Victoria from the period January 2013 to present'.

¹³ <https://www.audit.vic.gov.au/sites/default/files/20121024-Compliance-DPI-DSE.pdf>.

In relation to the Applicant's previous FOI request, the Agency estimated the request would capture in excess of 22,000 ATCW of which 14,000 ACTW relate to kangaroos. Further, I acknowledge the Agency, by email on 30 April 2019 advised the Applicant '[they] are welcome to nominate a substantially reduced time period' for its FOI request, in response to the Applicant's inquiry about narrowing the timeframe.

While the Applicant lodged a new request on 3 September 2019 with a narrowed timeframe, having reviewed copies of correspondence exchanged between the Applicant and Agency in relation to this request, I am satisfied the Agency responded reasonably to the Applicant's request. This included providing the Applicant with a reasonable opportunity to revise the request and information to assist it to remove the grounds of refusal. Having reviewed the Applicant's email of 12 September and 16 October 2019, I am satisfied it took a cooperative approach to rescope the terms of its request.

(f) The statutory time limit under section 21 for making a decision on this application

Based on the Agency's estimate of the work required to process the Applicant's request, the number of FOI requests the Agency currently 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.

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

Conclusion

41. In conducting my review, I have considered the Applicant's FOI request concerns two categories of documents.
42. In relation to the first category of documents, I have determined to refuse to grant access to the documents in accordance with the 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.
43. In relation to the second category of documents, I am satisfied no discrete document exists and it is not possible for the Agency to produce a document in accordance with section 19. In these circumstances, the FOI Act does not require the Agency to create a relevant document.
44. 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 falling within the first category of documents.

Review rights

45. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹⁴
46. The Applicant may apply to VCAT for a review up to 60 days from the date it is given this Notice of Decision.¹⁵

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
48. 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.
49. 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.¹⁷

When this decision takes effect

50. 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.

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and (3FA).