

## Notice of Decision and Reasons for Decision

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Applicant:	'AX7'
Agency:	Department of Justice and Community Safety
Decision Date:	19 December 2019
Provision considered:	Section 25A(1)
Citation:	'AX7' and Department of Justice and Community Safety ( <i>Freedom of Information</i> ) [2019] VICmr 215 (19 December 2019)

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FREEDOM OF INFORMATION – Road Safety Camera documents – 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 determined to refuse to grant access to the documents in accordance with the Applicant's revised 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.

**Joanne Kummrow**  
Public Access Deputy Commissioner

19 December 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to Victoria Police, which was transferred to the Agency, for access to the following documents:

All documentation referring to the acquisition of, testing, installation, maintenance, reports, reliability, and operation of Road Safety Camera [reference number] and ancillary equipment as installed at corner [named] Streets, Melbourne.

Specifically:

1. Copy of camera documented technical specifications in any request for tender or conveyed to selected supplier, whether the result of an RFT process, or repeat business.
  2. Copy of contract of supply between the supplier, and Victoria Police, or any other government department on behalf of Victoria Police, or as nominated purchaser.
  3. Copies of supplier documentation, including invoicing, shipment documentation, guarantee(s), terms and conditions of supply, including warranties.
  4. Copy of documentation of technical testing data from supplier, local workshop, installation site, and ongoing testing activities, including from camera monitoring departments within Victoria Police, and incident reports of operating feedback.
  5. Copies of documentation of technical and site maintenance of the camera and ancillary equipment.
  6. Copies of documentation log books, any and all records of reports on testing, adjustment, maintenance, or field reports of variance, or feedback from the camera itself, and/or associated equipment, and especially reports prepared and filed by camera and ancillary equipment technical staff.
  7. Copies of all documentation reporting on the ongoing reliability of the camera and ancillary equipment.
  8. Copies of any/all other documentation of facts of the camera and ancillary equipment, on its acquisition, testing, installation, maintenance, accuracy, reliability and scope of tolerances of the installed equipment, taken as a whole, interconnected system of devices that are in the so called Road Safety Camera installation, operating at the [named] Streets, Melbourne, since acquisition and operating at this date, including minutes of meetings to discuss camera [reference number] in any forum, including notes of attendees.
2. By letter dated 13 June 2019, in accordance with section 25A(6), the Agency:
    - (a) advised the Applicant that the request captures a large number of documents and the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations; and
    - (b) invited the Applicant to consult with the Agency to amend the request to enable the Agency to process it, providing the Applicant with several suggestions to narrow the request.
  3. By letter dated 19 June 2019, the Applicant responded with further comments and questions regarding the documents, but did not narrow the scope of the request. The Applicant noted:

I appreciate that what has been requested by me is on a wide spractrum [sic] and could involve a large volume of documentation, however, I envisage that the potential problem that I am addressing could have its source in any one of the areas that I have mentioned...You need to understand that I am not worried about the cost of the exercise, so long as justice emerges at the end of my campaign.
  4. By letter dated 28 June 2019, the Agency advised the Applicant it was not required under the FOI Act to respond to questions posed by the Applicant in their letter of 1 June 2019 regarding the content of documents that may fall in the scope of the Applicant's request. The Agency further advised that, as the request had not been narrowed to enable the Agency to process it, the Agency proposed to

refuse to grant access to documents in accordance with section 25A(1) as it considered the work involved in processing the request would substantially and unreasonably divert the Agency resources from its other operations.

5. The Agency invited Applicant to narrow the request to remove the grounds for refusal and provided the below suggestions for the Applicant to consider:
    - (a) reducing the timeframe, for example, to a six month period.
    - (b) limiting the types of documents you seek to access. For example, limiting the scope of the request to test and maintenance reports for a nominated date
    - (c) seeking specific documents relating to the contract portion of your request.
  6. On 13 July 2019, the Applicant revised their request to the following:
    1. Copy of document which describes in full the detection and camera equipment installed at the intersection of [named] Streets Melbourne ([reference number]).
    2. Copy of Certificate under Section 83 of the Road Safety Act, 1986, of testing of the “road safety camera” ([reference number]) dated [date] (without any information therein being redacted or altered in any manner).
    3. Copies of documentation which refers to the installation of “road safety camera” [reference number], culminating in the commencement of detection operations from January, 2018. Of particular interest is information on the installation delay.
    4. Copies of any/all documentation that refers to the decision to cease operation of “road safety camera” [reference number] as a dual detection device, showing the reasons for the decision, and the date upon which the change became effective.
    5. Copies of any/all documentary file references of the operation of “road safety camera” [reference number] on [date], including data of detections, false readings, operational concerns or feedback, and decisions arising from the operation of the camera on that day, etc.
    6. Copies of any/all documentary file references of the operation of “road safety camera” [reference number] on [date], including data of detections, false readings, operational concerns or feedback, and decisions arising from the operation of the camera on that day, etc.
    7. Copies of any/all documentary file references of the operation of “road safety camera” [reference number] on [date], including data of detections, false readings, operational concerns or feedback, and decisions arising from the operation of the camera on the day, etc.
  7. By letter dated 6 August 2019, the Agency acknowledged the revised terms for the request. However, it advised the search for relevant documents would likely return more than 2000 pages which would pose a substantial and unreasonable diversion of Agency resources from its other operations.
  8. The Agency provided the Applicant with a further 28 days to narrow the scope of their request and provided the following suggestion:

To assist you in amending the terms of your request, may I suggest you seek access for detection data for [reference number] for the [date range]. Identifying a specific time frames will assist in narrowing the volume of relevant documents.
  9. The Applicant responded by letter dated 22 August 2019 with further comments highlighting they believed they had already significantly reduced the volume of information sought and declining to further narrow the scope of their request.
  10. In its decision letter dated 5 September 2019, the Agency advised consultation had not resulted in a narrowing of the scope of the Applicant’s request sufficiently to enable it to be processed. Accordingly, the Agency refused to grant access to the documents in accordance with the Applicant’s revised request under section 25A(1).
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## Review

11. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's request for review;
  - (c) the Agency's submission dated 12 October 2019; and
  - (d) documents recording consultation between the parties in accordance with section 25A(6).
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.

## ***Refusal of a request under section 25A(1)***

15. Section 25A(1) provides a request may be refused by an agency in certain circumstances after consultation with an applicant in accordance with section 25A(6). The provision provides:
  - (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.

16. In *Secretary, Department of Treasury and Finance v Kelly*,<sup>1</sup> the Victorian 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... 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...

17. 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.<sup>2</sup>

18. 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.<sup>3</sup>

19. 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 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 requirements under section 25A(6)**

20. A decision to refuse to process a request under section 25A(1) cannot be made unless an agency first 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.<sup>5</sup>

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

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

<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.

<sup>5</sup> *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

21. As detailed above, the Agency wrote to the Applicant on 13 and 28 June 2019 and 6 August 2019, and provided opportunities for the Applicant to contact an Agency officer to consult and amend the request.
22. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse to grant access to the documents, and provided a reasonable opportunity for the Applicant to consult along with sufficient information to assist the Applicant in making the request in a form that would remove the ground for refusal. I note the Applicant responded with further comments, but did not sufficiently narrow the scope of their FOI request.
23. In the absence of agreement from the Applicant to further narrow the scope of their request, I will complete my review based on the Applicant's revised request of 13 July 2019, as detailed in paragraph 6 above.

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

24. 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?*

25. When determining whether to refuse a request under section 25A(1), 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 to be determined with absolute certainty would compel the agency to undertake the very work that section 25A(1) is designed to avert.<sup>6</sup>
26. In its consultation letter and decision letter to the Applicant, the Agency provided details regarding the estimated number of documents, processing time and staff resources required as summarised below:
  - (a) The documents falling within the scope of the request are conservatively estimated to be in excess of 2000 pages with an estimated search time of more than eight hours.
  - (b) Parts 5 – 7 of the Applicant's revised request consist of camera log files and, as every vehicle is logged, the documents for this part of request would exceed 1500 pages.
  - (c) At the time of the Applicant's request the Agency was processing over 200 other FOI requests.
  - (d) The Agency's FOI resources are at capacity and it needs to balance the needs of all applicants in the context of the number of requests on hand.
27. In the Agency's submission, it reiterated the above estimates and further elaborated on the resources available to process the Applicant's request, noting the Agency currently has 7.4 FOI officers who, as at 5 December 2019, are processing 209 other FOI requests.
28. I acknowledge the Applicant's confidential comments regarding the format of documents and the Agency's ability to quickly download electronic documents, and the Applicant's concerns regarding the reasons for the Agency's refusal to process the request.
29. Having considered the terms of the Applicant's revised request, the Agency's decision letter and submission:

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<sup>6</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

- (e) I accept for the Agency to conduct a thorough and diligent search for documents falling within the terms of the Applicant's request, document searches would take a considerable amount of time.
- (f) I agree that the likely number of relevant pages captured by the Applicant's FOI request would be significant, given the broad nature of the Applicant's FOI request.
- (g) In any case, even if the number of documents was significantly less (eg. 1000 documents), I am satisfied the scope of the Applicant's amended request and the processing of it would involve a substantial diversion of the Agency's resources as it would necessarily divert multiple staff from their other FOI duties to undertake document searches and assessment.

30. Accordingly, on the information before me, I am satisfied the time required for the Agency to search, identify and process the relevant documents would involve a substantial diversion of the Agency's resources.

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

31. 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 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.<sup>7</sup>

32. 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*.<sup>8</sup>

33. 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 revised request are sufficiently precise to enable Agency staff to locate documents relevant to the revised request and with the reasonable exercise of effort.

- (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.

In this case, I acknowledge the Applicant has a personal interest in obtaining access to the documents in support of a Magistrates' Court matter in which [they are] involved. However, on the information before me, I do not consider there is a broader public interest that would be served by disclosure of the documents sought.

- (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

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

<sup>8</sup> *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

As at 5 December 2019, the Agency has 7.4 FOI officers and the Agency has 209 other FOI requests in progress.

I consider the Agency provided sufficient information about the estimated number of documents relevant to the revised request, the effort required to locate and process documents, the Agency's current FOI requests on hand, available staff resources and the work involved in processing the Applicant's request. I am satisfied the work involved would significantly impact upon the FOI unit and the ability of its staff to process other FOI requests. As such, I am not satisfied the revised request is a reasonably manageable one.

(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 correspondence between the Agency and the Applicant exchanged prior to the Agency's decision. I am satisfied it responded reasonably to the revised request, including providing the Applicant with:

- (i) an explanation of the work involved in processing the FOI request, searching, identifying and assessing relevant documents;
- (ii) a reasonable opportunity to narrow the scope of the request; and
- (iii) suggested ways in which the Applicant could narrow the scope of the request to remove the ground for refusal.

While the Applicant engaged cooperatively with the Agency in an attempt to reduce the number of documents relevant to the request by limiting the areas of the Agency required to be searched, ultimately, the Applicant declined to sufficiently narrow the scope of the request.

(e) The 30 day statutory time limit for making a decision in this application

Given the broad scope of the revised request, I accept document searches and processing of the documents would take a considerable amount of time.

Further, given the Agency's FOI staff resources and other requests on hand, I consider it would be difficult for the Agency to process the request within the statutory timeframe under section 21 and processing the request would likely interfere with the other operations of the FOI unit and the relevant program area.

34. Accordingly, on the information before me, I am satisfied the diversion of the Agency's resources would also be unreasonable.

**Conclusion**

35. On the information before me, I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
36. Therefore, I have determined to refuse to grant access to the documents in accordance with the Applicant's revised 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.
37. Despite my decision, it is open to the Applicant to make a new FOI request to the Agency. In doing so, the Applicant may wish to reduce the scope of any new request to cover a shorter timeframe or



seek only specific documents or categories of documents (as suggested by the Agency during the consultation process).

### **Review rights**

38. 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>
39. 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>
40. 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>
41. 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.
42. 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***

43. 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.

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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).

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