

## Notice of Decision and Reasons for Decision

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Applicant:	'AZ6'
Agency:	Department of Transport
Decision date:	7 January 2020
Provision considered:	Section 25A(1)
Citation:	'AZ6' and Department of Transport ( <i>Freedom of Information</i> ) [2020] VICmr 1 (7 January 2020)

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FREEDOM OF INFORMATION – substantial and unreasonable diversion of Agency 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 the documents in accordance with the Applicant's FOI request under section 25A(1) on the grounds I am satisfied the work involved in processing the Applicant's FOI request would substantially and unreasonably divert the resources of the Agency from its other operations.

Accordingly, the Agency is not required to process the Applicant's request.

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

7 January 2020

### Reasons for Decision

## Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Documents from V/Line to [Public Transport Victoria] PTV relating to the Murray Basin Rail Project proposal that comprise:

- responses to requests for information or opportunities for consultation,
  - advice or submissions to PTV.
2. By letter dated 17 October 2019, the Agency wrote to the Applicant in accordance with section 25A(6), notifying the Applicant it intended to refuse the request under section 25A(1) as it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Applicant was invited to consult with the Agency with a view to removing the proposed ground of refusal by refining the scope of the request.
  3. The Applicant did not refine the scope of the request.
  4. In its decision letter of 19 November 2019, the Agency advised the Applicant it had determined to refuse the request under section 25A(1).

## Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application; and
  - (c) the Agency's submission dated 20 December 2019.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

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

9. Section 25A provides:

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

- (1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request—
  - (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations;

...

- (2) Subject to subsection (3) but without limiting the matters to which the agency or Minister may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency or Minister is to have regard to the resources that would have to be used—
  - (a) in identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister; or
  - (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used—
    - (i) in examining the documents; or
    - (ii) in consulting with any person or body in relation to the request; or
  - (c) in making a copy, or an edited copy, of the documents; or
  - (d) in notifying any interim or final decision on the request.
- (3) The agency or Minister is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.

...

- 10. Once an agency decides to refuse an FOI request under section 25A(1), it bears the onus of establishing it has met the requirements of the exemption. Namely, processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.<sup>1</sup>
- 11. 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 FOI request would substantially and unreasonably divert the Agency's resources from its other operations.<sup>2</sup>

**Consultation by Agency with the Applicant**

- 12. Section 25A(6) provides:

An agency or Minister must not refuse to grant access to a document under subsection (1) unless the agency or Minister has—

- (a) given the applicant a written notice—
  - (i) stating an intention to refuse access; and
  - (ii) identifying an officer of the agency or a member of staff of the Minister with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
- (b) given the applicant a reasonable opportunity so to consult; and
- (c) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.

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<sup>1</sup> *Chief Commissioner of Police v McIntosh* [2010] VSC 439 at [11].

<sup>2</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 & Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

13. In *Secretary, Department of Treasury and Finance v Kelly*,<sup>3</sup> the Victorian Supreme Court of Appeal described the purpose of section 25A(1):

...it is plain enough that s.25A was introduced to overcome the mischief that occurs when an agency's resources are substantially and unreasonably diverted from its core operations by voluminous requests for access to documents. The emphasis of the amendment was on the prevention of improper diversion of the agency's resources from their other operations. The provision was introduced to strike a balance between the object of the Act... and the need to ensure that the requests under the Act did not cause substantial and unreasonably disruption to the day to day workings of the government through its agencies...

14. I have reviewed the Agency's notice of intention to refuse access dated 17 October 2019.
15. I am satisfied the Agency provided the Applicant notice of its intention to refuse access and provided a reasonable opportunity to consult, and provided sufficient information to assist the Applicant in making the request in a form that would remove the proposed ground for refusal.

*Would processing the request involve a substantial and unreasonable diversion of the Agency's resources from its other operations?*

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

17. In *McIntosh v Police*,<sup>4</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) stated:

... essentially I take these words not to require overwhelming proof of difficulty, and to allow some latitude to the Respondent, given that the difficulty of the process can only be estimated, not proven.

18. The Tribunal went on to observe while precision is not required, the respondent in that case had not 'grappled with the question of what time and resources would reasonably be involved',<sup>5</sup> concluding there was 'no credible evidence of a large or unreasonable workload being generated by the request'.<sup>6</sup>

19. The Supreme Court of Victoria has held the meaning of the words 'other operations' includes 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>7</sup>

20. When determining whether to refuse a request, it is only possible for an agency to estimate how much time and effort would be spent to process the request. To require the issue be determined with absolute certainty would compel the agency to undertake the very work section 25A(1) is designed to avert.<sup>8</sup>

21. In its consultation letter to the Applicant, the Agency provided the following details regarding the quantity of documents relevant to the request and the time and staff resources required to process it:

- (a) keyword searches conducted within the relevant document storage system identified more than 240 potentially relevant documents, including reports, charts, submissions and correspondence;

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<sup>3</sup> [2001] VSCA 246 at [48].

<sup>4</sup> (Vic) [2008] VCAT 916 at [21].

<sup>5</sup> Ibid, at [29].

<sup>6</sup> Ibid, at [26].

<sup>7</sup> *Chief Commissioner of Police v McIntosh* [2010] VSC 439 at [24].

<sup>8</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

- (b) among the identified documents, there are a number of reports authored by V/Line for PTV, ranging from 15 to over 230 pages which likely fall within the scope of the Applicant's request;
- (c) other documents identified comprise correspondence such as emails;
- (d) examination of the identified documents may require further searches to be conducted to meet the terms of the request;
- (e) substantial consultation would be required concerning the status and content of the retrieved reports, and personal affairs information; and
- (f) the consultation process will be excessively time consuming because of the number of individuals involved.

22. The Agency also submits the following with respect to the time and resources that would be reasonably involved in processing the request:

- (a) it is apparent from the preliminary searches that substantial consultation would be required with a number of parties in relation to the status and content of the documents and personal affairs information;
- (b) to date, the request has required the involvement of over 20 staff in searches and discussions;
- (c) there are six FOI staff who are able to undertake the assessment of the documents requested, however much of the processing has rested with the former PTV FOI Officer, given that person's expertise in relation to PTV;
- (d) there are approximately 153 other FOI requests requiring processing by FOI staff;
- (e) processing of this request in its entirety would occupy many months. An attempt to process the request would undermine the ability of the FOI unit to process other requests. Large numbers of requests would be delayed, resulting in appeals, complaints and loss of confidence in the FOI process.

23. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the approach adopted taken in *The Age Company Pty Ltd v CenITex*.<sup>9</sup>

24. I consider the following factors particularly relevant in the circumstances of this case:

- (a) Whether the terms of the request offer a sufficiently precise description to permit the Agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort

I consider the terms of the request were sufficiently precise to enable the Agency to locate the documents sought by the Applicant to be identified within a reasonable time. This does not, however, take into account the time and resources that would be required to examine and consult upon those documents.

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<sup>9</sup> [2013] VCAT 288 at [43] – [45].

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

During consultation with the Agency, the Applicant stated:

...such scrutiny as the FOI Act may provide is firmly in the public interest, given the appalling mismanagement that is apparent concerning the Murray Basin Rail Project that remains incomplete with its budget exhausted.

If the FOI Act is not designed for scrutiny and transparency around a project so comprehensively botched as the Murray Basin Rail Project, it is hard to see what other circumstances would provide greater justification.

I note the Applicant made their request for documents within their official capacity as a member of Parliament, and I accept matters relating to the use of public funds and transport infrastructure are areas of public and political interest.

(c) Whether the request is reasonably manageable

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

I note the Applicant's request for review, which states:

... PTV appear to be encouraging [the Applicant] to narrow the scope of [their] request to a degree that the document [they are] seeking, and knows to exist, may likely fall outside the scope of such a further revised request.

In light of this concern, I note that it is open to the Applicant to make a request for access to a specific document.

Alternatively, the Applicant may make a new request for multiple documents with reformulated wording that would still capture any particular document or group of documents sought. For example, the Applicant may limit the date range, specify a particular type of document sought, and exclude certain documents from their request, such as email correspondence and draft documents.

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

Having reviewed the correspondence between the Agency and the Applicant sent prior to the Agency's decision, I am satisfied the Agency responded reasonably to the Applicant's request, including providing the Applicant with an explanation of the work involved in processing the request and reasonable opportunities to revise the scope of the request.

I note the Agency provided the following options to assist the Applicant to narrow their request, following the Applicant's notice that they were unwilling to refine the time period of the request:

Other possible options to narrow the request include:

- Focussing on a particular aspect of the Project that is of interest; and/or
- Limiting the request to specific types of reports (for example: project brief, design and investigation proposal, project management proposal, business case, procurement strategy, project risk register, or periodic project status reports).

The Applicant maintained they did not wish to redraw the boundaries of their application.

(e) The statutory time limit for making a decision

Due to the work required to process the request and the limited resources available to the Agency, 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 the Agency.

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

25. Having considered the above factors, I am satisfied the diversion of resources would be substantial and unreasonable in this matter.

**Conclusion**

26. 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. Therefore, I accept it was open to the Agency to invoke section 25A(1) to refuse to process the Applicant's FOI request.
27. Accordingly, I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(1).

**Review rights**

28. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>10</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
31. 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.
32. 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>13</sup>

**When this decision takes effect**

33. 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>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).