

Notice of Decision and Reasons for Decision

Applicant:	'BA3'
Agency:	Victorian Institute of Teaching
Decision Date:	21 January 2020
Provision considered:	Section 25A(1)
Citation:	'BA3' and Victorian Institute of Teaching (<i>Freedom of Information</i>) [2020] VICmr 7 (21 January 2020)

FREEDOM OF INFORMATION – substantial and unreasonable diversion of agency resources – 2000 pages – records relating to the applicant

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.

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.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

21 January 2020

Reasons for Decision

Background to review

1. On 14 November 2019, the Applicant made a request to the Agency for access to certain documents.
2. By letter dated 18 November 2019, the Agency wrote to the Applicant advising it considered the request was not valid under section 17(2) and invited the Applicant to consult with the Agency with a view to make a valid request.
3. Following consultation with the Agency, the Applicant submitted a valid request, as follows:
 1. All documents concerning me or relating to me starting from [date range].
 2. All documents concerning me or relating to me starting from [date range].
 3. All documents concerning me or relating to me starting from [date range].
 4. All documents concerning me or relating to me starting from [date range].
 5. All documents concerning me or relating to me starting from [date range].
 6. All documents concerning me or relating to me starting from [date range].
 7. All documents concerning me or relating to me starting from [date range].
 8. All documents concerning me or relating to me starting from [date range].
 9. All documents concerning me or relating to me starting from [date range].
 10. All documents concerning me or relating to me starting from [date range].

In summary, all documents “concerning me or relating to me” starting from [date range].

The above would include the following:

- i. All communications to and from VIT to any third party.
- ii. All material gathered by the VIT or in possession of the VIT concerning me or related to me.
- iii. All investigative files concerning me or related to me.
- iv. All reports made to the VIT concerning me or related to me.
- v. All inquiries from any prospective employers concerning me or related to me.
- vi. All documents in the possession of the Conduct and Compliance branch at the VIT concerning me or related to me.

Please exclude from the above the following:

- a. Any duplicates, triplicates, etc.
- b. Any documents sent to me by the VIT on a regular basis such as the monthly newsletter, information sent as bulk emailing to teachers, etc.

The VIT understands that you do not seek names and other personal affairs information of third parties (except officers of the VIT and Department of Education and Training), and those can be redacted as irrelevant to your request under s 25 of the FOI Act (“**Request**”).

4. On 10 December 2019, the Agency wrote to the Applicant advising it proposed to refuse to grant access to the documents sought under section 25A(1) on the basis it ‘is presently satisfied that the work involved in processing the Request would divert its resources substantially and unreasonably from its other operations’.
5. The Agency invited the Applicant to narrow the scope of the request to remove the grounds of refusal. The Agency provided the following suggestions for the Applicant to consider in order to ‘possibly remove the grounds for refusal’:
 - (a) You may wish to seek only specific documents;
 - (b) You may wish to seek only certain types of documents or categories of documents;

- (c) You may wish to seek only seek documents relating only to particular topics or subject matter;
- (d) You may wish to seek documents over a narrow period;
- (e) It is expected that if you chose to exclude any documents sent between you and the VIT that would significantly narrow the scope of the request.
- (f) You may wish to specify kinds of documents you do not seek or which you would be willing not to receive.
- (g) You may wish to agree for the VIT to process only the unique email/s at the end of an email chain, rather than all duplicate email chains.

6. The Applicant responded to the Agency by telephone and email on 12 December 2019. The Applicant requested the Agency process the request, as follows:

...I agree that suggestion number 7... is accepted in that VIT processes only the unique email/s at the end of an email chain.

...

...what I am mainly interested in are roman numerals (i) to (vi) on pages 1 and 2 of you letter. So, as per the *Penhalluriack* decision and others, please process those first. This would be document held by the Conduct and Compliance Team.

Thus, I am narrowing the request as follows:

Process items 6, 7, and 10 only with respect to roman numerals (i) to (vi).

Process items 5, 8 and 9 next as above.

Process items 1-4 next as above.

Process items 1-10 with respect to what is held by the teacher Registration and Engagement Area.

7. In its decision dated 12 December 2019, the Agency refused to grant access to the documents in accordance with section 25A(1) on grounds the work involved in processing the request would substantially and unreasonably divert its resources from its other operations as set out in the letter of 10 December 2019.

Review

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications received from the parties, including:
- (a) the Agency's decision on the FOI request;
 - (b) the Applicant's application for review dated 23 December 2019 and information provided with their application; and
 - (c) the Agency letter and supporting documents dated 15 January 2010.

11. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Refusal of a request in accordance with section 25A(1)

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

25A Requests may be refused in certain cases

- (1) The agency... dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency... is satisfied that the work involved in processing the request -
 - (a) in the case of an agency – would substantially and unreasonably divert the resources of the agency from its other operations; ...
- (2) Subject to subsection (3) but without limiting the matters to which the agency... may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency... is to have regard to the resources that would have to be used –
 - (a) in identifying, locating or collating the documents within the filing system of the agency, ... or
 - (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used –
 - (i) in examining the documents; or
 - (ii) in consulting with any person or body in relation to the request; or
 - (c) in making a copy, or an edited copy, of the documents; or
 - (d) in notifying any interim or final decision on the request.
- (3) The agency... is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.
- (4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency... must not have regard to –
 - (a) any reasons that the person who requests access gives for requesting access; or
 - (b) the agency's ... belief as to what are his or her reasons for requesting access....
- (6) An agency... must not refuse to grant access to a document under subsection (1) unless the agency... has –
 - (a) given the applicant a written notice -
 - (i) stating an intention to refuse access; and
 - (ii) identifying an officer of the agency... with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
 - (b) given the applicant a reasonable opportunity so to consult; and
 - (c) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.

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

... it is plain enough that section 25A was introduced to overcome the mischief that occurs when an agency's resources are substantially and unreasonably diverted from its core operations by voluminous requests for access to documents. The emphasis of the amendment was on the prevention of improper diversion of the agency's resources from their other operations. The provision was introduced to strike a balance between the object of the Act... and the need to ensure that the requests under the Act did not cause substantial and unreasonable disruption to the day to day workings of the government through its agencies ...
15. The Supreme Court of Victoria has held the meaning of the words 'other operations' in section 25A(1) 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.²
16. 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.³
17. In reviewing the Agency's decision, I am required to consider whether the requirements of section 25A(1) are satisfied at the time of my review. That is, whether at the time of my decision, processing the FOI request would substantially and unreasonably divert the Agency's resources from its other operations.⁴

Consultation under section 25A(6)

18. A decision to refuse to process a request under section 25A(1) cannot be made unless an agency provides notice to an applicant stating its intention to refuse the request, nominates an agency officer with whom the applicant can consult, provides a reasonable opportunity for the applicant to consult and lastly, provides information to assist the applicant in amending its request to a form that would remove the proposed ground for refusal.⁵
19. I have reviewed the Agency's notice of intention to refuse access dated 10 December 2019.
20. 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. In my view the Agency's letter of 10 December 2019 provided a number of options that the Applicant could reasonably have considered in order to narrow their request.
21. I note that while the Applicant did narrow their request in relation to email chains, in my view this did not narrow the request sufficiently to remove the proposed grounds of refusal. I also consider the fact that the Applicant advised they agreed to accept the request being processed in stages does not remove the grounds for refusal.
22. I will complete my review based on the Applicant's revised request of 12 December 2019.

¹ [2001] VSCA 246 at [48].

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

³ *Ibid* at [11].

⁴ The general rule that applies to tribunals when conducting administrative law proceedings (by way of a *de novo* review) is that the factors to be considered and the law to be applied are as at the date of review. This principle does not appear in the FOI Act, but is established by case law, including the following authorities, *Shi v Migration Agents Registration Authority* [2008] HCA 31, *Victoria Legal Aid v Kuek* [2010] VSCA 29, *Tuitaalili v Minister for Immigration & Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

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

Review of the application of section 25A(1)

23. 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 from its other operations?

24. 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 refuse the request. To require that the issue be determined with absolute certainty would compel the Agency to undertake the very work that section 25A(1) is designed to avert.⁶
25. 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) The documents falling within the scope of the Request are conservatively estimated to consist of more than 2000 pages.
 - (b) As you may be aware, the definition of a "document" in the Act is very broad and effectively includes anything on which information is stored.
 - (c) The documents you seek are likely to be held in the following areas of the VIT:
 - Teacher Registration and Engagement
 - Conduct and Compliance Team
 - (d) The types of documents are typically held in the Teacher Registration and Engagement area include:
 - (i) Applications for registration;
 - (ii) Applications for renewal;
 - (iii) Emails between a teacher and the VIT in relation to registration or renewal;
 - (iv) Identity and qualification documents
 - (e) The types of documents typically held in the Conduct of Compliance Team include:
 - (i) Communications between VIT and third parties
 - (ii) Investigations files
 - (iii) reports
 - (f) The documents are likely to exist in hard copy and/or electronic form.
 - (g) It is estimated that searching and retrieving documents, printing them (where electronically held) and checking the documents for relevance would take staff members at least 20 work hours. This is on the assumption that all other work for which they are responsible would be ignored (which the FOI Act does not require them to do).

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

- (h) The relevant staff members have limited available time to respond to the Request consistent with attendance to their core responsibilities. Responding to FOI requests forms only a small fraction of their day to day duties and the time to process the Request in its present form would divert them substantially and unreasonably from fulfilling their core role. Assuming 1 work hour per day to assist in processing the Request, it is estimated that it would take 20 work days to identify and retrieve the documents.
- (i) There will also be additional time required to remove any duplication of documents and then to copy the relevant ones.
- (j) There would be time associated with assessing the documents for exemptions under the FOI Act, including consulting with individuals or entities that are entitled to be informed of the request for information about them in accordance with the FOI Act. It is likely that a number of third parties would need to be consulted in relation to possible exemptions. More time would be required to draft any decision letter and seek any necessary legal or other advice.
- (k) The FOI officer responsible for dealing with requests under the FOI Act is able to dedicate 3 hours per week to processing FOI requests, consistent with attendance to [their] other considerable work priorities as an Executive Officer of the VIT.
- (l) It is estimated that to examine the relevant documents and make a decision on whether they are exempt from disclosure, taking into account all relevant facts and circumstances (including the outcome of any consultation) would take the FOI Officer 35 hours if only 1 minute is spent examining each page. More than 1 minute could be required where the application of an exemption or multiple exemptions is involved. Based on the FOI Officer's availability it is estimated that it would take more than 10 work days to examine the documents and make a final decision on the Request alone. This does not include the estimated search time referred to earlier to identify the relevant documents beforehand or in consulting with various individuals and a business to determine their views on disclosure.
- (m) The VIT is currently processing 3 FOI request or review applications. The VIT usually processes around 10 requests per year. The resources of VIT are usually ample to deal with the number of requests received.

26. On the information before me, given the estimated large number of documents relevant to the Applicant's request, I accept the time required for the Agency to undertake a thorough and diligent search for documents falling within the terms of the request, to assess those documents and consult with third parties (assuming all such consultation would be practicable) would involve a substantial diversion of the Agency's resources from its other core operations.
27. It is therefore necessary for me to consider whether the diversion of resources would be 'unreasonable' in the circumstances.

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

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

29. 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*

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

Ltd v CenITex,⁸ in which VCAT considered relevant factors when determining if a request involves an unreasonable diversion of an agency's resources. I consider these factors below in the context 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 time and resources that would be required to examine and consult upon these documents, I am not satisfied the Agency would be able to locate the documents within a reasonable timeframe with the exercise of reasonable effort.

- (a) 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 *Mildenhall v Department of Education*,¹⁰ 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.

I acknowledge the Applicant's strong interest in obtaining access to the documents. However, having considered the subject matter of the request, I do not consider there is an interest shared by the broader public that would compel access to the documents in this instance.

- (b) 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 letter dated 10 December 2019 states the documents falling within the scope of the request 'are conservatively estimated to consist of more than 2000 pages'. This estimate was made by manually counting pages in relevant hard copy files. The Agency submits there are additional documents in electronic form that were not factored into the estimate.

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.

- (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.

As at 15 January 2019, the Agency does not have any current FOI applications.

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

⁹ Section 3(1).

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

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 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.

Accordingly, 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.

In light of this concern, I note it is open to the Applicant to make a new request with a narrower scope.

- (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.

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, discussing the matter with them, and providing information about the types of documents subject to the request that they could select from, and suggesting the scope of the request be narrowed to a shorter timeframe.

- (e) The statutory time limit for making a decision in this application.

As outlined above, the Agency estimated it would take 20 hours to search for documents and 35 hours to examine the documents. Given the FOI officer can dedicate 3 hours per week to FOI, I am satisfied it would take the Agency over 18 weeks to process the FOI request in its current form.

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

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

Conclusion

31. 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.
32. Accordingly, I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(1).
33. 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.

Review rights

34. 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.¹¹
35. The Applicant may apply to VCAT for a review up to 60 days from the date it is given this Notice of Decision.¹²
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
37. 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.
38. 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

When this decision takes effect

39. 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.

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).