

## Notice of Decision and Reasons for Decision

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Applicant:	'BE4'
Agency:	Victoria Police
Decision Date:	5 March 2020
Provision considered:	Section 25A(1)
Citation:	'BE4' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 46 (5 March 2020)

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FREEDOM OF INFORMATION – law enforcement documents – police documents – arrest – Professional Standards Command – substantial and unreasonable diversion of agency resources from other operations – not substantial and unreasonable

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 am not satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Accordingly, I am not satisfied the requirements for refusal to grant access to documents in accordance with the Applicant's FOI request dated 7 October 2019 under section 25A(1) are met and the Agency is required to process the Applicant's request.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

5 March 2020

## Reasons for Decision

### Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to the following documents:
    1. The names and registered numbers of all members of Victoria Police that were present when [the name of the Applicant, date of birth] was arrested on [date] by Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number];
    2. Any brief of evidence that has been prepared, or is being prepared, by any member of Victoria Police in relation to the conduct of Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number] towards or in relation to [name of the Applicant, date of birth] and/or [named person, date of birth] on [date];
    3. Any brief of evidence that has been prepared, or is being prepared, by any member of Victoria Police in relation to disciplinary proceedings, whether commenced or not, against Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number] due to their conduct towards or in relation to [name of the Applicant, date of birth] and/or [named person, date of birth] on [date];
    4. The current status and/or outcome of any proceedings contemplated or commenced against Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number] for which any brief of evidence referred to in 2. or 3. above has been or is being prepared;
    5. Any and all witness statements taken by any member of Victoria Police in relation to the conduct of Leading Senior Constable [name, registered number], Leading Senior Constable [name, registered number] and any other member of Victoria Police towards [name of the Applicant, date of birth] and/or [named person, date of birth] on [date], if said statements have not been included in any brief of evidence referred to in 2. or 3. above;
    6. Any and all witness statements taken by any member of Victoria Police in relation to the manner or speed at which the [colour] [motor vehicle make and model] with registration number [redacted] was being driven, if said statements have not been included in any brief of evidence referred to in 2. or 3. above;
    7. Any and all witness statements taken by any member of Victoria Police in relation to the conduct of [name of Applicant, date of birth] on [date], if said statements have not been included in any brief of evidence referred to in 2. or 3. above;
    8. Any and all notes and running sheets made by Leading Senior Constable [name, registered number], Leading Senior Constable [name, registered number] or any other member of Victoria Police in relation to [name of Applicant, date of birth] and/or [named person, date of birth] on or after [date], whether handwritten or otherwise;
    9. Any and all memorandum or forms sent or received by Leading Senior Constable [name, registered number], Leading Senior Constable [name, registered number] and any other member or employee of Victoria Police in relation to the conduct of Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number] towards or in relation to [name of Applicant, date of birth] and/or [named person, date of birth] on [date];
    10. Any and all recordings, whether audio-visual or audio only, of interviews conducted by any member of Victoria Police with [name of Applicant, date of birth] and/or [named person, date of birth] on or after [date];
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11. Any and all recordings made by any dash cam that was in or affixed to any police vehicle(s) driven by Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number] on [date], from the moment that the [colour] [motor vehicle make and model] with registration number [redacted] first appears in the recording to the moment that the police vehicle(s) arrive at any police station;
12. Any and all recordings made by any dash cam that was in or affixed to any other police or civilian vehicle that recorded the [colour] [motor vehicle make and model] with registration number [redacted] prior to and/or after it was intercepted by Leading Senior Constable [name, registered number] and/or Leading Senior Constable [name, registered number] on [date];
13. Any and all recordings of any call made to "000" by Leading Senior Constable [name, registered number] or Leading Senior Constable [name, registered number] or any other police member in relation to the [colour] [motor vehicle make and model] with registration number [redacted] and/or [Applicant, date of birth] on [date]; and
14. The attendance register entry for [location] Police Station on [date], and/or any other record of [name of Applicant, date of birth] and/or [named person, date of birth] arrival and departure from [location] Police Station on [date].

2. By letter dated 31 October 2019, the Agency wrote to the Applicant and advised it interpreted items 2 and 3 to be for files relating to a Professional Standards Command investigation and outcomes.
3. Furthermore, in accordance with section 25A(6), the Agency notified 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.
4. The Applicant did not respond to the Agency's invitation to refine the scope of the request.
5. In its decision letter of 29 November 2019, the Agency advised the Applicant it had determined to refuse the request under section 25A(1).

## **Review**

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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;
  - (c) the Agency's submission dated 21 January 2020; and
  - (d) the Agency's response to a preliminary view that processing the Applicant's request would not substantially and unreasonably divert the resources of the Agency from its other operations dated 12 February 2020.

9. 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)**

10. Section 25A(1) provides a request 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.
- (4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency or Minister must not have regard to—
  - (a) any reasons that the person who requests access gives for requesting access; or
  - (b) the agency's or Minister's belief as to what are his or her reasons for requesting access.

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

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

12. In *Chief Commissioner of Police v McIntosh*,<sup>2</sup> the Supreme Court of Victoria stated:

The requirements of s 25A(1) are not easily satisfied. In *Secretary, Department of Treasury and Finance v Kelly, Ormiston JA* held that s 25A(1) should only be applied to a “clear case” of substantial and unreasonable diversion. The Court was referred to a decision of the New South Wales Administrative Decisions Tribunal, *Chapman v Commissioner of Police*, which conveniently summarised some of the Tribunal decisions in which s 25A(1) had been successfully invoked. The three matters referred to involved thousands of pages of documents and a commitment of the available officers’ time in the order of “years”, “15 – 16 months” and “between 15 and 30 weeks”.

13. When determining whether to refuse a request, it is only necessary 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>3</sup>

14. 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.

15. 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>

16. Once an agency decides to refuse access under section 25A(1), it bears the onus of establishing it has met the requirements of this provision; namely, that processing the request would substantially and unreasonably divert the resources of the agency from its other operations.<sup>7</sup>

#### ***Did the Agency meet its consultation requirements under section 25A(6)?***

17. Section 25A(6) provides:

- (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 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.

18. Having reviewed the Agency’s notice of intention to refuse access dated 31 October 2019, I am satisfied the Agency fulfilled the requirements of section 25A(6) prior to refusing to grant access under section 25A(1).

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<sup>2</sup> [2010] VSC 439 at [32].

<sup>3</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

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

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

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

<sup>7</sup> *Ibid* at [11].

***Would processing the request substantially and unreasonably divert the Agency's resources from its other operations?***

19. In my review, I must determine whether processing the request represents both a 'substantial' and 'unreasonable' diversion of the Agency's resources.
20. The words 'substantially' and 'unreasonably' are not defined in the FOI Act. Accordingly, these words are to be given their ordinary meaning.
21. In its consultation letter to the Applicant, the Agency provided the following details regarding the quantity of documents relevant to the request and its estimate of the time and staff resources required to process the request:
  - (a) preliminary searches identified in excess of 400 pages relevant to the terms of the request; and
  - (b) these include over 300 pages relating to complaint files and additional material, including dash camera footage, police radio transmissions, a Brief of Evidence and internal correspondence and memorandums.
22. The Agency submits the following additional information with respect to the time and resources that it estimates would be reasonably involved in processing the request:

Initial searches have identified dash cam footage and police communications. To view/listen and possibly edit this material is an onerous task. Together with the documents already located, an assessor has estimated the time for the work involved:

400 pages: approximately 3 hours

18 minutes of Dashcam: approximately 8 hours

30 minutes of Audio: approximately 3 hours
23. The Agency further submits:

Currently, [as at 12 February 2020] the FOI Division has over 440 active FOI requests. The FOI Division comprises 4 assessing teams (an assessor, consultation officer and a support officer). There are 4 floating assessors providing backfill support to the teams. There is also one team devoted to pre-assessment comprising a Senior Sergeant and part time VPS 2. On average, each assessing team has approximately 110 files assigned to them for processing. It is worth noting that due to the government wide recruitment freeze, approximately 15% of the Division's established positions are currently vacant.
24. While I note the Agency identified approximately 400 pages during initial searches, I do not consider this to be a large number of pages given the nature of the documents sought and the Agency's likely familiarity with such documents, experience in processing similar requests and its views on the application of exemptions to such documents, practicability of consulting with third parties and provision of edited copies of audio recordings and footage.
25. While I acknowledge it would take an Agency staff member approximately 14 hours to process the request, I do not consider demonstrates the work involved in processing the request would be substantial.
26. Accordingly, on the information before me, I am not satisfied the Agency processing the Applicant's request would substantially divert the resources of the agency from its other operations

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

27. 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>8</sup>

28. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the following factors considered by VCAT:<sup>9</sup>

- (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 clear terms of the request and nature of documents sought are sufficiently precise to enable the Agency to locate the documents sought by the Applicant within a reasonable time and with the exercise of reasonable effort.

- (b) Whether the request is reasonably manageable

The Agency's decision to refuse to grant access focuses on the number of FOI requests it has on hand, limited staff resources, the number of documents the Agency estimates it would be required to process and the time it would take to process those documents.

I acknowledge the number of current FOI requests the Agency has on hand is large and the Agency reports it has limited staff resources to process those requests. These factors, while no doubt of concern to the Agency's FOI unit, are matters within the control and influence of the Agency.

It is foreseeable that a reduced number of staff employed, suitably trained or authorised to make FOI decisions will inevitably lead to a backlog in FOI requests to be processed by an agency and may impact upon the way in which the agency administers the FOI Act.

However, I note an agency's obligations under the FOI Act. In my view, what must be avoided, as it would be contrary to the object of the FOI Act and Parliament's intention, is for section 25A(1) to be used as a mechanism to manage an agency's workload and tolerance level for processing FOI requests to those of a certain nature or size that might not otherwise satisfy the high threshold set by section 25A(1).

In this case, on the information before me, I am satisfied the request is a reasonably manageable one.

- (c) 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

I accept the Agency's initial assessment of the work involved in processing the Applicant's request is reasonable.

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<sup>8</sup> *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

<sup>9</sup> *The Age Company Pty Ltd v CenITex* [2013] VCAT 288 at [43]-[45].

Having reviewed correspondence between the Agency and the Applicant, sent prior to the Agency's decision, I note the Agency provided the following options to assist the Applicant to narrow their request:

A suggestion for refining your scope would be to request:

1. Electronic Patrol Duty Return – [redacted]
2. Internal Memo's x2 – for non-authorised BOE [Brief of Evidence] relating to your client
3. Internal Correspondence x3 – for non-authorised BOE relating to your client
4. Centre for Road Policing Investigations – Member's Statement
5. Attendance Summary

My view is that the Agency presented reasonable options to the Applicant to remove its view that it held grounds for refusal.

However, while the Applicant did not respond to the Agency's invitation to consult by the required date in accordance with section 25A(6), an applicant is not bound to accept an agency's proposed grounds for refusal under section 25A(1).

In declining to respond to the Agency's proposed grounds for refusal, I accept this constituted a refusal by the Applicant to reduce the scope of their request as suggested by the Agency. In the circumstances of this matter, I do not consider this is indicative of the Applicant not taking a co-operative approach to redrawing the boundaries of their application.

(d) The statutory time limit for making a decision

On the information before me, I am satisfied the Agency would be able to process the request within the statutory time limit for making a decision under section 21.

In the event processing the request would require more time, section 21(2) provides for the for extensions of time which the Agency could either rely upon and/or for which the Agency could request the agreement of the Applicant.

Accordingly, I do not accept the statutory time limit is a barrier to the Agency processing the request.

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

A key reason the FOI Act was enacted was to ensure a person can access information held by government about them.

As such, there is a strong public interest in open government and transparency in that members of the public have access to official government records, unless there is a compelling reason to refuse access.

In their application for review, the Applicant's representative stated:

The documents held by Victoria Police will assist in determining whether there is sufficient grounds to issue proceedings against Victoria Police in relation to the incident when [Applicant's name and date of birth] was arrested on [date] by Leading Senior Constable [name] and/or Leading Senior Constable [name].



I accept the Applicant holds a strong personal interest in obtaining access to the documents.

Public sector employees are required to conduct themselves with integrity, impartiality, accountability and respect. Individuals can raise concerns of suspected wrongdoing by public sector employees by making a report to the relevant agency or authority.

Accordingly, I consider there is a broader public interest that may be served by disclosure of the documents or at the very least the request being processed rather than categorically refused under section 25A(1) based on the factors set out in paragraph 23 above.

29. Having considered the above factors and on the information before me, I am not satisfied the Agency processing the Applicant's request would unreasonably divert the resources of the Agency from its other operations

### **Conclusion**

30. On the information before me, I am not satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
31. Accordingly, I am not satisfied the requirements for refusal to grant access to documents in accordance with the Applicant's request under section 25A(1) are met, and the Agency is required to process the Applicant's request.

### **Review rights**

32. 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>10</sup>
33. 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>
34. 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>
35. 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.
36. 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**

37. 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).