

## Notice of Decision and Reasons for Decision

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Applicant:	'BF4'
Agency:	Monash University
Decision Date:	11 March 2020
Exemptions considered:	Section 25A(1)
Citation:	'BF4' and Monash University ( <i>Freedom of Information</i> ) [2020] VICmr 55 (11 March 2020)

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FREEDOM OF INFORMATION – documents regarding PhD candidature – correspondence – 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 in that I have decided the work involved in processing the 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

11 March 2020

## Reasons for Decision

### Background to review

1. On 24 October 2019, the Applicant made a request to the Agency for access to following documents:
  1. A document which shows the date on which [specified person] was enrolled as a candidate for the qualification of PhD.
  2. A document which shows the date on which the qualification of PhD was conferred on [specified person].
  3. A document which shows the name of [specified person]’s supervisor whilst completing [their] PhD.
  4. All documents which support the contention of the [specified position] of the University, [specified person], made in [their] email of [date] that concerns raised by [position and specified person] in [their] email of [date] “have all been dealt with and finally considered in the past by the Monash University”.
  5. All documents held by [specified person] that refer to myself from the time [they] joined as the [specified position] to the [specified position] at the time [they] functions as the [specified position].
  6. All documents held by the offices of [specified positions] that make a reference to myself covering the period [specified person] joined as [specified position] to the [specified position] to the time [they] functioned as the [specified position].
2. By letter dated 21 November 2019, the Agency wrote to the Applicant advising, in accordance with section 25A(1), that it considered the work involved in processing the Applicant’s FOI request would divert the resources of the University substantially and unreasonably from its other operations.
3. In accordance with its obligations under section 25A(6), the Agency advised the Applicant that before making its decision on the request under section 25A(1), it was required to consult with the Applicant with a view of narrowing the request in order to remove the ground for refusal.
4. The Applicant’s legal representative responded to the Agency on 22 November 2019 with further comments, addressing a number of queries in the section 25A(6) notice, however did not narrow or amend the scope of the request.
5. In its decision, dated 26 November 2019, the Agency advised that consultation had not resulted in a narrowing of the scope of the request and determined to refuse to process the request, pursuant to the provisions of section 25(A)(1) of the FOI Act.

### 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) the Agency’s submission dated 11 December 2019 and subsequent correspondence dated 5 March 2020; and
  - (c) the information provided with the Applicant’s request for review.

9. I note that the Applicant had previously made a substantially similar request to the Agency, which led to the Agency reaching the same decision. The Applicant sought review of that Agency decision, which my office finalised on 30 September 2019. The decision was that the work involved in processing the request would have substantially and unreasonably diverted the Agency's resources from other operations at that time and therefore the Agency was not required to process the request.
10. 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)***

11. Section 25A(1) provides that 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.
  - (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.
  - ...
  - (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.

12. The Victorian Supreme Court of Appeal in its decision of *Secretary, Department of Treasury and Finance v Kelly*,<sup>1</sup> 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...

13. Once an agency decides to refuse to grant access to a request under section 25A(1), the Agency 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>2</sup>
14. 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 decided to refuse to process the request.<sup>3</sup>

### **Consultation under section 25A(6)**

15. 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 and 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>4</sup>
16. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access, and provided a reasonable opportunity to consult along with sufficient information to assist the Applicant in making the request in a form that would remove the proposed ground for refusal. I note that the Applicant's legal representative responded with further comments however did not narrow or amend the scope of the FOI request.
17. In the absence of agreement from the Applicant to narrow the scope of the request, I must complete my review on the basis of the scope of the Applicant's original FOI request.

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

<sup>2</sup> Ibid at [11].

<sup>3</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.

<sup>4</sup> *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

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

18. I have considered the Agency's decision letter, which determined that the resources required to search, identify and examine documents, assess and make a decision, and consult third parties would substantially divert the resources of the Agency from its other functions. I have also considered the broad terms of the Applicant's request.
19. I accept the Agency's advice that in order for the Agency to conduct a thorough and diligent search to meet the terms of the Applicant's request, a search of relevant documents would be required in a number of locations within the Agency. I consider a search for documents would also require Agency staff to manually search through archived hard copy records to identify documents the Applicant is seeking. I agree that to do this would add to the time taken to process the request.
20. I am satisfied it was reasonable for the Agency to claim that a search for documents within the scope of the request would be significant in circumstances where the Applicant has had dealings with the Agency over a considerable period of time. Accordingly, I am satisfied the work involved in processing the Applicant's request would amount to a substantial diversion of resources.
21. However, in my review of this matter I have sought to consider and address key questions below to determine whether the diversion of the Agency's resources would be both 'substantial' and 'unreasonable' in the circumstances.

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

22. 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>5</sup>
23. In its decision, the Agency has provided the Applicant with an estimate of the time required to search, retrieve and analyse the documents, and consult with the affected third parties mentioned in over 7,000 pages of documents. The Agency noted that it would take 10 staff in various areas of the Agency over 50 hours to search for documents and over 233 hours for the Agency's FOI Officer to examine, assess and make a final decision on the documents.
24. There is one primary FOI officer employed by the Agency in a 0.8 equivalent full time (EFT) position, who dedicates up to 80% of their time to processing FOI requests, along with other duties and work priorities. At the time of making this decision, the Agency has advised it is processing four other FOI requests, one of those involving a large number of documents.
25. On the information before me, I accept the time required for the Agency to undertake the search, identification and assessment of documents would involve a substantial diversion of the Agency's resources.

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

26. 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:

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<sup>5</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

...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>6</sup>

27. 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>7</sup>

28. 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.

The Agency, in its consultation correspondence with the Applicant's legal representative, advised that documents exist in various forms and are held in multiple areas of the University including [multiple named areas of the University].

I consider the terms of the request were sufficiently precise to enable the location of documents relating to the Applicant's request to be identified. However, this does not take into account the time and resources that would be required to interrogate databases and hard copy documents, and examine and consult upon those documents.

- (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. For the Applicant, I acknowledge that there is a strong personal interest in the documents.

While the subject matter of the FOI request is important to the Applicant, I do not consider there is a broader interest shared by the public in this particular matter that would be served by disclosure of the documents.

- (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.

Based on the information before me and as set out above, I consider the Agency has provided sufficient information about the complexity involved in processing the documents subject to the Applicant's request, as well as its current workload and resources to demonstrate the work involved in processing the Applicant's request would unreasonably divert its resources from its other operations.

- (d) The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a co-operative 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 the Agency responded reasonably to the Applicant's request, including providing the Applicant with:

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<sup>6</sup> *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

<sup>7</sup> *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

- (a) an explanation of the work involved in processing the FOI request, searching, identifying and assessing the relevant documents, and consulting with various third parties;
- (b) a reasonable opportunity to revise the scope of the request; and
- (c) suggested ways to narrow the request that would allow the Agency to process it.

I note that while the Applicant's legal representative responded to the Agency's consultation correspondence under section 25A(6) addressing some of the concerns raised, the Applicant did not narrow or amend the scope of the request.

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

Given the breadth of the Applicant's request, and the Agency's limited FOI Unit resources, 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 requests would likely interfere with the other operations of those areas.

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

### **Conclusion**

30. On the information available, 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.

### **Review rights**

31. 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>8</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
34. 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.
35. 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>11</sup>

### **When this decision takes effect**

36. 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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).

**Other matters**

37. Despite my decision, I note it is open to the Applicant to make a new FOI request to the Agency for the documents sought.
38. In doing so, the Applicant may wish to reduce the scope of any new request to cover a shorter timeframe (as suggested by the Agency during the consultation process) or seek only specific documents or categories of documents. The Applicant may then wish to make a further, suitably narrowed, FOI request to seek documents from the Agency.