

## Notice of Decision and Reasons for Decision

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Applicant:	'BG7'
Agency:	Victoria Police
Decision Date:	13 March 2020
Provision considered:	Section 25A(1)
Citation:	'BG7' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 67 (13 March 2020)

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FREEDOM OF INFORMATION – law enforcement documents – police documents – statements – summary of charges – photobooks – interpose report – CCTV – 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.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied the work involved in processing the Applicant's 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 [date] 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

13 March 2020

## Reasons for Decision

### Background to review

1. On [date], the Applicant, through their representative, made a 15-point request to the Agency for access to certain documents.
2. By letter dated [date], the Agency wrote to the Applicant in accordance with section 25A(6) notifying of its intention to refuse to grant access to documents in accordance with the request under section 25A(1) on grounds it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
3. The Applicant was invited to consult with the Agency with a view to removing the proposed grounds for refusal by refining the scope of the request.
4. By correspondence dated [date], the Applicant refined the scope of their request to the following documents:
  - 1) All statements obtained in the matter;
  - 2) Summary of Charges;
  - 3) Charge Sheets;
  - 4) Interpose report;
  - 5) Photographs;
  - 6) CCTV footage.
5. In its decision letter dated 9 October 2019, the Agency wrote to the Applicant to advise the terms of the refined request did not remove the Agency's grounds for refusal, and the documents were 'still considerable, being over 200 pages not including CCTV footage'. The Agency 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) information provided by the Agency and its submission dated 14 February 2020; and
  - (d) the Agency's response to my preliminary view that processing the Applicant's request would not substantially and unreasonably divert the resources of the Agency from its other operations sent on 29 January 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 the application of section 25A(1)

10. Section 25A(1) provides that 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 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 unreasonable disruption to the day to day workings of the government through its agencies...

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

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

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

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 [date], I am satisfied the Agency fulfilled the requirements of section 25A(6) prior to refusing to grant access under section 25A(1).

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

19. In my review of this matter, I must determine whether processing the refined request represents both a 'substantial' and 'unreasonable' diversion of Agency resources in the circumstances.

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<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].

20. The words 'substantially' and 'unreasonably' are not defined in the FOI Act. Accordingly, these words are to be given their ordinary meaning.
21. The Agency submits the following with respect to the estimated time and resources that would be reasonably involved in processing the refined request:
  - (a) at this point in time, the assessor has advised there is still a considerable amount of work involved in gathering and processing the documents. Documents, such as the summary and statements, are 105 pages, there are 7 photobooks which at an early estimate would be well over 50 pages, Interpose report [is] 4 pages, CCTV [is] 4 minutes; and
  - (b) processing the photobooks would be time consuming as it would involve copying each photo.
22. The Agency further submitted that it had 465 active FOI requests and six assessors to process those requests.
23. In its submissions dated 12 February 2020, the Agency further advised regarding its current FOI workload and available staff resources:
  - Currently, the FOI division has over 440 active FOI requests.
  - The FOI division comprise [4] assessing teams. There are [4] floating assessors providing backfill support to teams. There is also one team devoted to pre-assessment comprising a Senior Sergeant and one part time employee.
  - On average, each assessing team 110 files assigned to them for processing.
  - Due to the government wide recruitment freeze, approximately 15% of the Division's established positions are currently vacant.
24. I note the information set out above about the number and type of documents identified by the Agency. However, 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. 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?***

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:

...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>

27. In determining unreasonableness for the purpose of section 25A(1), I have had regard to the approach adopted in *The Age Company Pty Ltd v CenITex*.<sup>9</sup>
28. I consider the following factors are relevant in the circumstances of this case:

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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> [2013] VCAT 288 at [43]-[45].

- (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 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 submits the request is not reasonably manageable due to the considerable amount of work involved in gathering and processing the documents requested.

I acknowledge the number of current FOI requests the Agency has on hand is large and the Agency reports it has limited staff 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.

The reasonableness of the Agency's initial assessment, and whether the Applicant has taken a cooperative 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.

Having reviewed correspondence between the Agency and the Applicant, sent prior to the Agency's decision, I consider the Applicant has taken a cooperative approach to redrawing the terms of their request, from 'all materials' including 15 specific types of document, to six specific types of documents.

While I note the Applicant did not agree to reduce the scope of their request to that as interpreted by the Agency in its formal consultation letter dated [date], in my view, the Applicant's response to formal consultation needs to be considered in the context of them already having significantly reduced the scope of their request.

Accordingly, I consider the Applicant has taken a cooperative approach to redrawing the boundaries of their original FOI request.

- (c) 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.

(d) The public interest in disclosure of 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.

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 21 and 22 above.

29. Having weighed up the above factors, I am satisfied processing the Applicant's FOI request would not substantially and unreasonably divert the resources of the Agency from its other operations to process the refined request.

**Conclusion**

30. On the information before me, I am not satisfied the work involved in processing the Applicant's refined request would substantially and unreasonably divert the resources of the Agency from its other operations.
31. Accordingly, I am not satisfied the requirements for 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.

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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).

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