

Notice of Decision and Reasons for Decision

Applicant:	'BE7'
Agency:	Department of Transport
Decision date:	10 March 2020
Provision considered:	Section 25A(1)
Citation:	'BE7' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 49 (10 March 2020)

FREEDOM OF INFORMATION – all emails to and from agency head – chief executive officer (CEO) – Suburban Rail Loop Authority – substantial and unreasonable diversion of agency's resources

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. Accordingly, I have decided to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(1).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
10 March 2020

Reasons for Decision

Background to review

1. On 8 October 2019, the Agency received a request from the Applicant for access to documents. On 23 October 2019, the request was subsequently amended by the Applicant to the following terms:

All emails to and from Suburban Rail Loop Authority CEO [name] since the creation of that authority to the date of receipt of this request [8/10/2019].
2. Therefore, the relevant period for documents subject to the Applicant's request is between 3 September 2019 and 8 October 2019. A period of 5 weeks.
3. By letter dated 12 December 2019, the Agency wrote to the Applicant, in accordance with section 25A(6), notifying of its intention 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 Agency also invited the Applicant to consult with an Agency officer about the terms of the request with a view to removing the proposed ground of refusal by refining the scope of the request (**consultation letter**).
4. In summary, the Applicant declined to further refine the scope of their request.
5. By letter dated 29 January 2020, the Agency advised the Applicant of its decision 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 the request.
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) consultation undertaken by the Agency and the Applicant under section 25A(6); and
 - (d) the Agency's submission dated 3 March 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.

Application of section 25A(1)

10. 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).

11. Section 25A provides:

25A Requests may be refused in certain cases

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

12. In *Secretary, Department of Treasury and Finance v Kelly*,¹ 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

¹ [2001] VSCA 246 at [48].

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. ...

13. In *Chief Commissioner of Police v McIntosh*,² 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”.

14. When determining whether to refuse a request, it is only necessary for an agency to estimate how much time and effort would be spent processing 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.³

15. In *McIntosh v Police*,⁴ 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.

16. VCAT 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’,⁵ concluding there was ‘no credible evidence of a large or unreasonable workload being generated by the request’.⁶

17. 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.⁷

18. 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, processing the request would substantially and unreasonably divert the resources of the agency from its other operations.⁸

19. 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.⁹

² [2010] VSC 439 at [32].

³ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

⁴ [2008] VCAT 916 at [21].

⁵ *Ibid* at [29].

⁶ *Ibid* at [26].

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

⁸ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

⁹ 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.

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

20. Having reviewed the consultation letter and subsequent correspondence exchanged between the Agency and Applicant, I am satisfied the Agency, having formed a view as to the resources required to process the request, fulfilled its consultation requirements under section 25A(6).

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

21. I am required to determine whether processing the Applicant's request represents both a 'substantial' and 'unreasonable' diversion of the Agency's resources.
22. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and so are to be given their ordinary meaning.
23. In the Agency's consultation letter, it provided the following details regarding the estimated number of documents and pages relevant to the request based on initial searches undertaken by the Agency:
- (a) more than 480 emails;
 - (b) up to 250 email attachments, including excel files and other media; and
 - (c) the emails were sent between a wide range of individuals and traverse various subject matter including recruitment, Cabinet matters, legal advice, planning and matters associated with the establishment of the Suburban Rail Loop Authority.
24. On the information before me, I am satisfied the Agency has sufficiently demonstrated processing the Applicant's request, in its current form, would substantially divert the resources of the Agency from its other operations on grounds:
- (a) the estimated number of emails and attachments captured by the Applicant's request would, in my view, exceed 1000 pages;
 - (b) combined with the broad categories of documents captured by the Applicant's request and the diverse range of topics likely to be canvassed in the documents sought;
 - (c) the likely complexity involved in Agency staff responsible for processing FOI requests assessing documents captured by the Applicant's request;
 - (d) consultation that would be likely be required to be undertaken by Agency FOI staff in order to process the documents sought, including with other Agency staff to understand or clarify the nature and/or context of at least certain documents sought given the diverse range of topics likely to be canvassed;
 - (e) third party consultation that would be likely be required to be undertaken by Agency FOI staff, for example, with third party individuals in accordance with section 33(2B) and other agencies responsible for the establishment of the Agency; and
 - (f) at the time of my review, the Agency currently has 116 FOI requests on foot and 9 Agency staff to process these requests.
25. Therefore, it is also necessary for me to consider whether the substantial diversion of the Agency's resources would be 'unreasonable' in the circumstances.

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

26. In *Re SRB and Department of Health, Housing, Local Government and Community Services*, 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.¹⁰

27. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the following factors:¹¹

(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 am satisfied the terms of the request and nature of the documents sought are sufficiently precise to enable the Agency to locate the requested documents.

Further, I consider the documents sought can be located within a reasonable time by the Agency with the exercise of reasonable effort.

(b) 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

The Agency's decision to refuse the request focuses on the number documents captured by the request and the broad range of topics to which the documents would relate given the role of the sender and recipient of the emails, who is the CEO of the Agency.

The terms of the Applicant's request are not directed towards seeking access to documents concerning a specific topic(s) or subject matter(s). As stated above, I accept the Agency's submission the emails were sent between a wide range of individuals and traverse various subject matter including recruitment, Cabinet matters, legal advice, planning and matters associated with the establishment of the Suburban Rail Loop Authority.

I accept the CEO is likely to send and receive emails, of which a high proportion would concern important and sensitive matters, given the CEO's leadership role within the Agency, and would encompass a broad range of topics with which the CEO would be reasonably likely to be involved including, but not limited to, personnel, contractual, financial, legal and deliberative matters.

As such, I consider the broad ranging nature of documents captured by the request would require Agency FOI staff to consult on a number of potential issues and considerations as to whether the requested documents could be released with a large number of persons within and outside the Agency in order to process the documents sought and to meet the Agency's consultation requirements under the FOI Act.

On balance, I am not satisfied the Applicant's request, in its current form, is a reasonably manageable one.

¹⁰ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹¹ I note these factors were considered in *The Age Company Pty Ltd v CenITex* [2013] VCAT 288 at [43]-[45].

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

On the information before me, I accept the Agency's estimated figures with regard to the number of documents relevant to the request and initial assessment of the work involved in processing the request is reasonable.

Having reviewed communication between the Agency and the Applicant, I am satisfied the Agency advised the Applicant about possible options with a view to assisting the Applicant so as to remove the proposed grounds for refusal.

In the circumstances, I consider it was open to the Applicant to refine the scope of their request given the broad nature of the documents sought and the practical advice provided by the Agency. However, the Applicant declined to reduce the scope of their request.

- (d) The statutory time limit for making a decision

On the information before me, I am satisfied the Agency would not be able to process the request within the statutory time limit for making a decision under section 21.

While I note section 21(2) provides for extensions of time the Agency could either rely upon and/or request the agreement of the Applicant, I consider the nature of the documents sought and the diverse range of topics likely to be canvassed mean the time required for the Agency to examine the documents and consult with any person or body in relation to the request, based on its size and complexity mean that, even if an extension of time were granted, the Agency would not be able to process the request within a reasonable time.

This factor is further compounded by the number of FOI requests the Agency has on foot concurrently, despite the reasonable number of Agency staff able to undertake the processing of FOI requests.

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

I note the object of the FOI Act is to extend the right of access to information to the community, limited only by essential public, private and business interests and there is a general public interest in agencies making the maximum possible amount of information available through FOI in the interests of open and accountable government.

However, given the broad nature of the documents sought, which would likely traverse a diverse range of topics, I am not able to determine on the face of the request and information provided by the Applicant whether there is a particular public interest that would be promoted by the disclosure of the documents sought.

28. Having weighed up the above factors, I am satisfied the work involved in processing the request would unreasonably divert the resources of the Agency from its other operations.

Conclusion

29. 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. Accordingly, I have decided to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(1).
30. While I have determined to refuse to grant access to 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

31. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
34. 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.
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.¹⁵

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.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).