

## Notice of Decision and Reasons for Decision

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Applicant:	'B13'
Agency:	Department of Education and Training
Decision date:	24 March 2020
Provision considered:	Section 25A(1)
Citation:	'B13' and Department of Education and Training ( <i>Freedom of Information</i> ) [2020] VICmr 81 (24 March 2020)

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FREEDOM OF INFORMATION – documents relating to the Applicant – over 1500 documents – documents spanning [multiple] years – 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 the Agency 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  
24 March 2020

# Reasons for Decision

## Background to review

1. On 9 January 2020, the Applicant made a request to the Agency for access to the following documents:

In accordance with the *Freedom of Information Act 1982* (Vic) (the "FOI Act"), with document defined as under the FOI Act, I would like access to the following documents:

1. All emails to and from [named person] concerning me or related to me since [date]. Only search (a) [their] existing email account, (b) the archived folders from [their] email account, and (c) [their] computer.
2. All emails to and from [named person] concerning me or related to me since [date]. Only search (a) [their] existing email account, (b) the archived folders from [their] email account, and (c) [their] computer.
3. All emails to and from [named person] concerning me or related to me since [date]. Only search (a) [their] existing email account, (b) the archived folders from [their] email account, and (c) [their] computer.
4. All emails to and from [named person] concerning me or related to me since [date] except emails sent to me or received from me. Only search (a) [their] existing email account in eduMail, (b) the archived folders from [their] email account, (c) [their] email account on Google Drive, and (d) [their] computer.
5. All emails to and from [named person] concerning me or related to me since [date]. Only search [their] archived email account which was preserved by the [the Agency] and was also sent to [another Victorian Government agency] as was testified to by [named person] in the [reference number] matter.

Additionally, I would be willing to work with the FOI unit of the [the Agency] to eliminate s.33 privacy concerns by agreeing to redact the names and personal information of third parties. Also, the first part of the email address can be redacted but not the last bit of the email address such as [example of email address] or @organisation.com.au, so that the organisation from which the email originated and the organisation it was sent to, can be identified. But names of the officers of the [Agency] below the VPS6 level should not be eliminated as a matter of course without consulting with me first. I will likely agree to redact most of them. Above VPS6 level should not be redacted at all. Also, the names of [three named persons] should not be redacted because only then will I know if one of them received or sent an email.

2. On 10 January 2020, the Agency wrote to the Applicant to acknowledge receipt of the request and would commence processing the request.
3. On 14 January 2020, the Agency wrote to the Applicant advising it proposed to refuse to grant access to the documents sought under section 25A(1) on grounds 'preliminary enquiries have found that 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 in accordance with section 25A(6) with a view to amend their request in a form that would remove the ground for refusal ('**consultation letter**').
4. In its consultation letter to the Applicant, the Agency provided the Applicant with the reasons for the proposed grounds of refusal, based on the current resources of the Agency, the resources required in order to process the request and the quantity of emails located during its preliminary search.
5. The Agency also provided the following suggestions to the Applicant to assist them in refining the scope of their request so as to remove the proposed grounds of refusal:

- (a) limit the scope of the search to a specific area of the Agency, a specific date range and/or a particular kind of document;
- (b) contact specific agency officers to discuss 'practical ways' to clarify the request; and
- (c) suggested the following amended terms for the request:

Revise the terms of your request to only 1 point, to be selected by you, instead of the 5 points presently listed. Further you may wish to reduce the timeframe of the documents you seek to a specific 6 month period.

- 6. On 27 January 2020, the Applicant responded to the Agency's invitation to consult, however, the scope of the request was not amended. The Applicant advised the Agency they were of the view the Agency's letter of 14 January 2020 was 'deficient with regards to providing [the Applicant] with a ground for refusal or grounds of refusal'. The Applicant also requested the Agency identify 'the specific 'volume' of pages under each FOI item' so they could narrow the scope of their request.
- 7. By email on 27 January 2020, the Agency responded to the Applicant, advising the Applicant of the results of further preliminary searches conducted for points 2, 3 and 4 in the request. The Agency advised the Applicant its suggestions to refine the scope of the request remained unchanged from its letter dated 14 January 2020. The Applicant was given until 5 February 2020 to consult with the Agency to remove the proposed grounds for refusal.
- 8. On 28 January 2020, the Applicant responded to the Agency, however, they did not amend the terms of their request. Amongst other things, the Applicant reiterated their view the Agency had not identified the grounds for refusal and advised the Agency the 'number of emails means nothing and is not helpful to...remove the ground(s) of refusal'.
- 9. The Agency proceeded to make its decision on the Applicant's request and refused to grant access to the documents in accordance with section 25A(1).

### **Review**

- 10. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
- 11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
- 12. 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; and
  - (c) the Agency's submission dated 20 February 2020.
- 13. 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)***

14. 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).
15. 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.

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

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

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 ...

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.<sup>2</sup>
18. 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.<sup>3</sup>
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.<sup>4</sup>

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

20. 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.<sup>5</sup>
21. In support of their application for review, the Applicant submits:
  - (a) the Agency did not identify the grounds for refusal;
  - (b) the Agency did not meet 'its positive obligation to consult as is required under *Kelly v Department of Treasury & Finance* (2001) VCAT 419'; and
  - (c) the Agency should have advised the applicant which parts, of the five parts of the FOI request, could have been processed so that the Applicant could amend the terms of their request.
22. As detailed above, the Agency wrote to the Applicant on 14 and 28 January 2020 and provided opportunities for the Applicant to consult with the Agency to amend the request. I am satisfied the Agency's letter of 14 January 2020 provided one or more options the Applicant could reasonably have considered in order to narrow their request, as outlined above.
23. Further, I note an agency cannot rely on section 25A(1) in relation to part of a request only and determine to process the remaining part of the request.<sup>6</sup>
24. In this instance, I am satisfied the Agency provided the Applicant with sufficient information concerning the number of emails identified in its preliminary search regarding points 2, 3 and 4 in the

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

<sup>3</sup> *Ibid* at [11].

<sup>4</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>5</sup> *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

<sup>6</sup> *XYZ v Victoria Police* [2007] VCAT 1686.

Applicant's request. Accordingly, I consider it was open for the Applicant to narrow the scope of the request to a particular point, as suggested by the Agency in its initial consultation letter.

25. Accordingly, having reviewed the correspondence, I am satisfied before making its decision, the Agency provided the Applicant with notice of its intention to refuse access to the documents, identified the grounds for refusal, provided a reasonable opportunity for the Applicant to consult and provided sufficient information to assist the Applicant in making their request in a form that would remove the proposed grounds for refusal.
26. Accordingly, I am satisfied the Agency complied with the consultation requirements under section 25A(6).

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

27. My review of this matter requires me to determine whether the Agency 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?*

28. 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 the issue be determined with absolute certainty would compel the agency to undertake the very work section 25A(1) is designed to avert.<sup>7</sup>
29. I am satisfied the Agency has provided a reasonable estimate of the quantity of documents relevant to the terms of the Applicant's request and the resources required to process the request.
30. In its initial consultation letter dated 14 January 2020, the Agency provided the following details regarding its then workload and the estimated quantity of documents and resources required to process the Applicant's request:

...

I have also taken into account that this office is currently processing **54** other FOI requests.

***The extent of documentation***

I advise that a preliminary search has occurred for documents relevant to the terms of your request. I advise that 382 emails, of an undetermined number of pages and attachments, have been identified for Point 2 of your request alone.

Further, this does not include further documentation that has yet to be identified in relation to Points 1, 3, 4 and 5 of your request.

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<sup>7</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

***Substantial and unreasonable diversion***

Due to the significant time that would be required to identify documents, consult with internal or external parties and make a decision on access, we have formed the view that processing your request in its current form would substantially and unreasonably divert the resources of the [Agency] from its other operations.

31. By email dated 27 January 2020, the Agency advised the Applicant it was processing 60 other FOI requests and it undertook further preliminary searches and located 1,504 emails within scope of the Applicant's request, comprising:
  - (a) 382 emails relevant to point 2 in the request;
  - (b) 553 emails relevant to point 3 in the request; and
  - (c) 569 emails relevant to point 4 in the request.
32. In its submission to this office, the Agency advised it undertook an additional preliminary search for documents relevant to point 5 in the request and located 19 emails.
33. Accordingly, a total of approximately 1,523 emails have been located in preliminary searches, which the Agency submits contain 'an indeterminate number of pages and attachments'. I also note the Agency's preliminary searches have been conducted in relation to points 2 - 5 in the request, and the Agency would also be required to undertake further searches for point 1.
34. In its submission, the Agency confirmed the current resources of its FOI unit, as follows:
  - (a) it currently has six full time FOI officers, 3 part time FOI officers (who combined total 1.4 FTE) who are available to process FOI requests;
  - (b) it is currently processing:
    - (i) 62 FOI requests;
    - (ii) ten OVIC complaints and reviews;
    - (iii) eight Victorian Civil and Administrative Tribunal (**VCAT**) matters; and
    - (iv) one matter before the Court of Appeal, Supreme Court of Victoria.
35. The Agency submits its FOI unit would be required to undertake the following steps to process the Applicant's request:
  - (a) conduct further searches for documents relevant to point 1 in the request;
  - (b) examine the documents to determine whether they fall within the scope of the request;
  - (c) examine the documents to determine whether any exemptions under the FOI Act apply;
  - (d) collate the documents; and
  - (e) undertake third party consultation with individuals and organisations, including providing those third parties with relevant documentation.
36. 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 further searches for

documents falling within the terms of the request, to assess all 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 operations.

37. 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?*

38. The term 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, Local Government and Community Services*, in which 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.<sup>8</sup>

39. In determining 'unreasonableness' for the purposes of section 25A(1), I have had regard to the approach adopted by VCAT in *The Age Company Pty Ltd v CenITex*,<sup>9</sup> in which the Tribunal considered relevant factors when determining if a request involves an unreasonable diversion of an agency's resources. These factors are considered 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.

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, given the Agency has already conducted searches for points 2 - 5 of the Applicant's request.

- (a) 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 conducted preliminary searches for relevant documents, locating approximately 1,523 emails that may fall within the scope of points 2 - 5 in the request. Further, additional documents may be located in regard to point 1 that have not yet been taken into consideration.

Based on the estimated number of documents relevant to the Applicant's request, as outlined above, I accept the request would represent a considerable burden for the Agency to process.

- (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.

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 current FOI workload and resources.

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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* [2003] VCAT 288 at [43]-[45].



I accept this information demonstrates the work involved in processing the Applicant's request would significantly impact upon the ability of its staff to 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 current 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.

- (c) 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.

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

I am not persuaded by the Applicant's submission the Agency was required to provide an estimation of the number of non-duplicate pages. As set out above, the Agency is required to provide a reasonable estimate of the number and type of documents subject to a request only. It is not required to undertake so much work or time in providing an estimate such that it has to effectively undertake an amount of work that section 25A(1) is designed to avert.

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 reasonably 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 in this application.

The Agency has not submitted the estimated time it would take to undertake additional searches and process the request. However, 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 the Agency can avail itself of and request extensions of time under section 21, I do not consider such extensions would allow for the request to be processed within a reasonable timeframe.

This factor is further compounded in the context of the Agency's current resources and the current scope of the Applicant's request.

- (e) 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'.<sup>10</sup>

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<sup>10</sup> Section 3(1).

However, in *Mildenhall v Department of Education*,<sup>11</sup> 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 personal interest in obtaining access to the documents. However, having considered the subject matter of the request, I am not satisfied there exists a public interest in disclosure of the documents sought by the Applicant's request.

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

### **Conclusion**

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

### **Review rights**

44. 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>12</sup>
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
47. 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.
48. 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>15</sup>

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

49. 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>11</sup> (unreported, VCAT, 19 April 1999) at [30].

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

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).