

Notice of Decision and Reasons for Decision

Applicant:	'BK2'
Agency:	Department of Health and Human Services
Decision Date:	31 March 2020
Provision considered:	Section 25A(1)
Citation:	'BK2' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 99 (31 March 2020)

FREEDOM OF INFORMATION – emails – agency executive – deputy secretary – time period – statement of priorities – substantially and unreasonably divert resources of Agency

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.

On the information before me, I am 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, the requirements for refusal to grant access to documents in accordance with the request under section 25A(1) are met and the Agency is not required to process the Applicant's request.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

31 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

A copy of all emails to or from [Name] (Deputy Secretary, [Business Division]), on either topic of "Statement of Priorities" or "Letter of Comfort", or any used acronym of either topic from [date] to the date of this request [date].

2. The Applicant did not seek personal affairs information in the requested documents.
3. The Agency's website provides the following information about 'Statements of Priorities' on its website:

Statement of Priorities are annual accountability agreements between Victorian public healthcare services and the Minister for Health. They outline the key performance expectations, targets and funding for the year as well as government service priorities.¹

4. The following introductory remarks are extracted from the *Statement of Priorities 2019-20 Agreement between the Minister for Health and Alfred Health*:

Statements of Priorities are key accountability agreements between Government and Victorian publicly funded health, mental health and ambulance services. The content and process for preparation and agreement of the annual Statement of Priorities is consistent with sections 40G, 65ZFA, 65ZFB and section 26 of the Health Services Act 1988.

Statements of Priorities are consistent with the health services' strategic plans and aligned to government policy directions and priorities. The annual agreements support the delivery of, or substantial progress towards the key shared objectives of quality and safety, good governance and leadership, access and timeliness, and financial sustainability.²

A Statement of Priorities consists of four main parts:

- Part A provides an overview of the service profile, strategic priorities and deliverables the health service will achieve in the year ahead.
- Part B lists the performance priorities and agreed targets.
- Part C lists funding and associated activity.
- Part D forms the service agreement between each health service and the state of Victoria for the purposes of the National Health Reform Agreement.

Performance expectations and mechanisms used by the Department of Health and Human Services to monitor and manage performance are described in the Victorian Health Service Performance Monitoring Framework 2019-20.

High standards of governance, transparency and accountability are essential. In this context, the Victorian Government commits to publish Statements of Priorities in November each year and present data on the performance of our health system in the public domain.

¹ See <https://www2.health.vic.gov.au/hospitals-and-health-services/funding-performance-accountability/statement-of-priorities/2019-20-statement-of-priorities>.

² Ibid. *Statement of Priorities 2019-20 Agreement between the Minister for Health and Alfred Health*, at 4.

5. On 29 November 2019, the Agency wrote to the Applicant advising it intended to refuse access to the documents 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.
6. The Applicant was invited to consult with the Agency with a view to narrowing the scope of the request to remove the proposed grounds for refusal. The Agency provided the following suggestions for the Applicant to consider in order to limit the request and remove the possible grounds for refusal:
 - (a) narrow the scope to emails between the relevant person and a particular health service; and/or
 - (b) narrow the timeframe to a one month period.
7. The Applicant declined to narrow the scope of their request.
8. The Agency conducted further sample searches so as to provide the Applicant with further information regarding the estimated work involved in processing the request.
9. On 9 January 2020, as a result of the further sample searches, the Agency provided the Applicant a another opportunity to narrow the scope of the request and suggested narrowing the terms of the request as set out in paragraph 3 above.
10. The Applicant declined to narrow the scope of their request.
11. In its decision dated 14 January 2020, the Agency refused access to documents in accordance with section 25A(1) on grounds it was satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Review

12. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
13. In conducting a review, I am required to consider whether the requirements of section 25A(1) are met as at the time of my review. That is, I must assess whether processing the request now would substantially and unreasonably divert the Agency's resources from its other operations under section 25A(1), rather than when the Agency made its decision to refuse to process the request.³
14. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
15. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (a) the Applicant's review application;
 - (b) the Agency's submission dated 31 January 2020; and

³ 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 and Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

(c) correspondence between the Applicant and the Agency during the processing of the request.

16. 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)

17. 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).

18. 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.

19. In *Secretary, Department of Treasury and Finance v Kelly*,⁴ 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 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 ...

20. In *Chief Commissioner of Police v McIntosh*,⁵ the Supreme Court of Victoria stated [footnotes omitted]:

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".

21. 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.⁶

22. In *McIntosh v Police*,⁷ 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.

23. 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',⁸ concluding there was 'no credible evidence of a large or unreasonable workload being generated by the request'.⁹

24. 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.¹⁰

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

25. I have reviewed the Agency's two letters sent to the Applicant advising of its intention to refuse access to the requested documents dated 29 November 2019 and 9 January 2020.

⁴ [2001] VSCA 246 at [48].

⁵ [2010] VSC 439 at [32].

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

⁷ [2008] VCAT 916 at [21].

⁸ *Ibid*, at [29].

⁹ *Ibid*, at [26].

¹⁰ *Ibid* at [11].

26. I am satisfied, before making its decision, the Agency complied with the requirements under section 25A(6), as it provided the Applicant with written notice stating its intention to refuse access the requested documents, nominated an Agency officer with whom the Applicant could consult, provided a reasonably opportunity for the Applicant to consult and provided, as far as reasonably practicable, the Applicant with information that would assist them in making their request in a form that would remove the proposed grounds for refusal.

Would processing the request involve a substantial diversion of the Agency's resources from its other operations?

27. My review involves determining whether processing the Applicant's request represents both a substantial and unreasonable diversion of Agency resources in the circumstances.
28. The words 'substantially' and 'unreasonably' are not defined in the FOI Act. Accordingly, these words are to be given their ordinary meaning.
29. When determining whether to refuse a request, it is only possible for an Agency to estimate how much time and effort would be spent in processing the request. To require the issue to be determined with absolute certainty would compel the Agency to undertake the very work section 25A(1) is designed to avert.¹¹
30. In its consultation letter, the Agency advised the Applicant it conducted a search for one month of the relevant Agency officer's emails (from [date] to [date]) and identified more than 80 emails.
31. Based on this estimate applied to a ten month period, this equates to approximately 800 emails (excluding attachments), which the Agency submits would substantially and unreasonably divert resources from its other operations.
32. In its submission to OVIC, the Agency advised the following in relation to why the request would substantially divert its resources from its other operations [citations omitted]:

Based on a conservative estimate that each email would contain on average two pages, and attachments would contain on average five pages, it is estimated the total number of pages of pages that would meet the terms of the request for a timeframe of one month ([date] to [date]) is 297 pages. The applicant's request is for a timeframe of ten months ([date] to [date]), therefore it is estimated that the total number of pages that would meet the terms of the request is 2970.

Given the workload and resources of the Freedom of Information (FOI) unit at the time, it was determined that the work involved in processing the request would substantially and unreasonably divert the resources of the department.

...

Resources

In this instance, it is the department's FOI unit's resources, specifically the non-personals team, which needs to be considered, not the resources of the whole of the department.

The FOI unit cannot call on other areas of the department to process FOI requests as they do not have the necessary expertise to assist. Nor is it possible at the time of this request to utilise staff from the personals team within the FOI unit due to their own workload as well as the lack of expertise required to process non-personal requests.

The non-personals team is dedicated to processing FOI requests from the media, members of parliament and the general public seeking access to non-personal documents. In addition, this team is

¹¹ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

involved in responding to Parliamentary orders to produce documents and other functions relating to the department's obligations under the Act.

At the time the decision was made, the non-personal team had three full time officers available to process FOI requests and 39 FOI requests on hand, of which 11 were overdue. This equates to 13 requests per officer. Based on the FOI unit's practice, a manageable caseload for an experienced FOI Officer is 10 requests.

The department treats each FOI request on a case by case basis including assessments of the work involved in processing a request. In this case we determined the work involved in processing the request was both substantial and unreasonable, in part due to the workload of the FOI unit limiting the resources available.

Estimate of resources required to process the request

It is estimated that each page of captured material would generate approximately 25 minutes work for the assessor. In arriving at the figure of 25 minutes per page, the department relies on section 25A(2) of the Act to include the following factors:

- saving documents onto the case management system, TRIM and in the shared computer drive;
- drafting internal and external correspondence such as emails, letters and briefings;
- phone conversations or meetings with staff from relevant program areas and third parties to understand the subject matter of the request;
- the need to undertake mandatory consultations with numerous third parties (there are over 100 public hospitals and health services in Victoria who may have had email communication with [Agency officer] regarding Statement of Priorities or Letters of Comfort) in accordance with ss 33(2B) and 35(1A). This includes attempting to obtain third parties' contact details, preparing redacted documents for consultation, drafting correspondence for consultation;
- undertaking legal research; and
- assessing the documents including the physical redaction of documents. This includes cross referencing documents to ensure consistency in redaction of material.

Based on the above estimate of total pages that would meet the terms of the request, it is estimated that it would take 1238 hours to process the 2970 pages relevant to the request.

This estimate also assumes one officer would work on the request to the exclusion of all other duties.

33. On the information before me, I accept the estimate of emails and attachments based on a one month search is sufficient and the approximate number of pages would be likely to total approximately 2970.
34. However, I do not accept the estimated time required by the Agency to process the request is reasonable. As stated above, the Agency estimates each page would require 25 minutes to review including time required to undertake third party consultation under section 33(2B) and 35(1A).
35. I note the Applicant does not seek access to personal affairs information in the documents. Therefore, I do not accept contemplated consultation would be necessary in accordance with section 33(2A).
36. Given the nature of the information provided in a Statement of Priorities, while it is possible the public health service providers may have intended information exchanged with the named Agency

officer to be confidential, I do not accept disclosure of such email correspondence would necessarily be contrary to the public interest by reason its disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future. Therefore, I do not accept the exemption under section 35(1)(b) would be likely to apply and the contemplated consultation would be necessary in accordance with section 35(1A).

37. Therefore, making a reasonable reduction to the Agency's estimate of 25 minutes per page, I have estimated each page would require an average of 18 minutes per page to process and calculated the estimated 2970 pages would take approximately 23 days to process (based on a 37.5 hour workday).
38. Regardless of the above reduction in the estimated average time to process each page, however, I accept the Agency's resources required to process the request in its current terms would involve a substantial diversion of resources from the Agency's core operations.

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

39. The term 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, Local Government and Community Services* by the Commonwealth Administrative Appeals Tribunal, 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.¹²

40. In determining 'unreasonableness' for the purposes of section 25A(1), I have had regard to the following factors considered by VCAT:¹³

- (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 are sufficiently precise for the Agency to locate the documents, and within a reasonable time and exercise of reasonable effort.

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

In its submission, the Agency acknowledges:

[Description of the Applicant]. The department acknowledges there is a public interest in transparency around the funding, performance and accountability of public health services. However, the department submits the public interest is met by the significant annual reporting obligations imposed on public health services under the *Health Services and Cemeteries Model annual reporting guidelines*.

The Applicant did not provide a submission in support of their review application, including in relation to any public interest factors relevant to disclosure of the requested documents in relation to publicly available Statements of Priorities.

- (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.

The Agency's submission states:

¹² *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹³ *The Age Company Pty Ltd v CenITex* [2013] VCAT 288 at [43]-[45].

... The non-personal team currently has three full time officers available to process FOI requests and 36 FOI requests on hand, of which 10 are overdue. The non-personal team is also due to commence work on a Parliamentary order to produce documents in the coming weeks. The personals team does not have capacity or expertise to assist and there are no other resources available to the FOI unit.

...

...it is not practical or equitable for FOI Unit to employ all three staff members of the non-personal team to work on processing of this matter to the exclusion of all other duties as the department is still required to process FOI requests received from other applicants.

....

The department is not able to process the request now as circumstances have not significantly changed. The non-personal team currently has three full time officers available to process FOI requests and 36 FOI requests on hand, of which 10 are overdue. The non-personal team is also due to commence work on a Parliamentary order to produce documents in the coming weeks. The personals team does not have capacity or expertise to assist and there are no other resources available to the FOI unit.

I acknowledge the number of current FOI requests the Agency has on hand and the Agency's report it has limited staff resources to process those requests within time, noting the team's other responsibilities regarding parliamentary orders to produce documents. 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 in a large agency that receives a large number of FOI requests on an annual basis,¹⁴ with significant responsibilities other than the processing of FOI requests, will inevitably lead to a backlog in FOI requests to be processed and may impact upon timeliness and the way in which an 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).

Having carefully considered the Applicant's request and submissions made by the Agency, on the information before me, I am satisfied the Agency has provided sufficient information to demonstrate the number of documents falling within the scope of the request mean the request, in its current terms, is not reasonably manageable.

This is further compounded by immediate and unprecedented pressures placed on the Agency in relation to its health functions and urgent work its staff are involved in arising from the COVID-19 pandemic.

As the Agency and its staff are responsible for advising on and implementing health policy on behalf of the government and the Minister for Health, I consider the unmanageable and unreasonable nature of the request is further demonstrated in the present environment.

- (d) The agency's estimate as to the number of documents affected by the request, and by extension the number of pages and the amount of officer time, and salary cost.

¹⁴ Based on figures in the *OVIC 2018-19 Annual Report*, which were provided by the Agency, it received 1723 FOI requests.

I consider the Agency's estimate of the number of documents likely to be subject to the terms of the request is reasonable in light of the searched undertaken by the Agency, as outlined above.

In relation to the Agency's estimate of the time required to assess the documents, as discussed above, I do not accept it would take an average of 25 minutes to process each page. However, regardless of my reduced estimate of time required to process each page, I accept the request in its current terms would involve an unreasonable diversion of those resources from its core operations.

- (e) The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a co-operative approach in redrawing the boundaries of the application.

Overall, I am satisfied the Agency's initial assessment was reasonable for the reasons set out above. I also consider the Agency provided the Applicant with sufficient information to assist them to narrow the scope of their request.

However, while noting the Applicant was not obliged to accept the Agency's suggestions to assist the Applicant in reducing the scope of their request, from my review of the correspondence between the parties, I consider the Applicant was firm in their view as to the reasonableness of the documents sought and declined to engage with the Agency with a view to reducing the scope of the request. For example, to identify a specific health service provider(s) or reduce the time period from 10 months to between 1-3 months.

- (f) The statutory time limit for making a decision in this application.

In its submission, the Agency states:

The most compelling aspect for determining that the request is an unreasonable diversion is the aspect of timeliness. The department estimates that it would take close to 33 weeks to process the request. ...

... In estimating resources and the likely time required to process a request, the minimum rather than the maximum time was included in the calculations in fairness to the applicant and in recognition that the estimates are imprecise.

I note the Agency can request extensions of time for completing such requests. However, in this instance, I am satisfied the Agency would likely not be able to process the request within a reasonable timeframe.

On the information before me, I am not satisfied the Agency would be able to process the Applicant's request in its current terms within the statutory 30 day time limit under section 21.

However, section 21(2) provides the Agency could request the Applicant's agreement to an extension of time of up to 30 days, which can be further extended by agreement. In the absence of any such agreement, the Agency could continue to process the request until such time as it was processed, or the Applicant applies to VCAT for review of a deemed decision by the Agency to refuse access to the documents.

Accordingly, while the statutory time limit for making a decision is a relevant factor, I do not consider it to be a significant factor in this matter.

41. Having weighed up the above factors, on balance, I am satisfied the Agency processing the Applicant's request in its current terms would unreasonably divert its resources from its other operations due the estimated large number of documents relevant to the request, the substantial work involved in the Agency processing the request given its current resources, and urgent work Agency staff are presently involved in arising from the COVID-19 pandemic.

Conclusion

42. On the information before me, I am satisfied the work involved in processing the Applicant's request would substantially and unreasonably divert the resources of the Agency from its other operations.
43. Accordingly, the requirements for refusal to grant access to documents in accordance with the request under section 25A(1) are met and the Agency is not required to process the Applicant's request.
44. 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

45. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
48. 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.
49. 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.¹⁸

When this decision takes effect

50. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and (3FA).