

Notice of Decision and Reasons for Decision

Applicant:	'BK3'
Agency:	Department of Education and Training
Decision Date:	31 March 2020
Provision considered:	Section 25A(1)
Citation:	'BK3' and Department of Education and Training (<i>Freedom of Information</i>) [2020] VICmr 100 (31 March 2020)

FREEDOM OF INFORMATION - employment records – termination of employment – dismissal – notes – correspondence – 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 fresh 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, through their legal representative, made a request to the Agency for access to the following documents:

We seek access to copies of all documents on your file in relation to our client, including but not limited to copies of all notes and correspondence in relation to any discussion leading up to [the Applicant's] dismissal on [date], the decision to terminate, or the reasons for termination, including any evidence of the matters to which [Agency's staff member position title] had regard in determining to dismiss [the Applicant], and any notes taken by the [Agency staff member] in the [dismissal process] in relation to [the Applicant].

2. Following consultation with the Agency, the Applicant's legal representative provided the following clarification:

We advise that our client's FOI application seeks documents pertaining to the dismissal of [their] employment by the Department on [date], at the time when [they were] employed as [role descriptor] in the Department, pursuant to a Contract of Employment dated [date] [position title].

3. [Redacted - background to the decision]. The Agency determined the FOI Act does not apply to the requested documents.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On [date], the Agency made a fresh decision to refuse access to documents in accordance with section 25A(1). The fresh decision was made within the required 28 days under section 49M(2).
7. The Agency's fresh decision refused access to the documents under section 25A(1). Accordingly, the Agency no longer relies on [redacted] to refuse access to the documents.
8. The Applicant does not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. 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.
10. 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.
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) communications between OVIC staff, the Applicant and the Agency.

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.

Application of 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 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.

16. 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 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. ...

17. 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".

18. 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

19. 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.

20. 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

21. 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

22. 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

¹ [2001] VSCA 246 at [48].

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].

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

23. 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 the consultation requirements under section 25A(6).

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

24. I am required to determine whether processing the Applicant's request represents both a 'substantial' and 'unreasonable' diversion of the Agency's resources.
25. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and so are to be given their ordinary meaning.

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

26. In the Agency's consultation letter, dated [date], 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 580 documents were identified by the Agency's [two business units] (this number reflects documents identified on [date] and further searches were yet to be conducted within these business units).
 - (b) Additionally, further searches were to be conducted by the following business units: [list of multiple business units].
27. 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 resources from its other operations on grounds:
- (a) the estimated number of documents and potential attachments captured by the Applicant's request would, in my view, exceed approximately 1000 pages;
 - (b) 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 assessing the documents captured by the Applicant's request;
 - (d) consultation within the Agency that would likely be required in order for the FOI unit to process the requested documents, including to understand the nature and context of certain documents sought;
 - (e) given the number of documents, a significant number of third party consultations that would be required in accordance with section 33(2B); and
 - (f) as of [date], the Agency has:
 - i. 29 FOI requests;
 - ii. eight Victorian Information Commissioner complaints and reviews;
 - iii. nine matters before VCAT; and

- iv. one matter before the Court of Appeal, Supreme Court of Victoria.

The Agency also stressed that the numbers above do not reflect the difficulties it is experiencing in responding to COVID-19, and the likelihood that it will soon have some of its staff redeployed to other critical tasks.

28. Having considered the terms of the request and the Agency's consultation letter and fresh decision, 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 processing the request involve an unreasonable diversion of the Agency's resources?

29. In *Re SRB and Department of Health, Housing, Local Government and Community Services*, the Commonwealth Administrative Appeals 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.⁹

30. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the following factors:¹⁰

- (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

As set out above, I am satisfied the Agency has provided sufficient information to the Applicant about the large number of documents estimated to fall within the terms of the request. 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.

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.

I consider the unmanageable and unreasonable nature of the request is compounded by immediate and unprecedented pressures placed on the Agency in relation to its education and training functions (for example, but not limited to, transferring the delivery of in person teaching to online learning for all primary and secondary students in Victoria) and urgent work its staff are involved in across the Agency arising from the COVID-19 pandemic.

⁹ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹⁰ I note these factors were considered in *The Age Company Pty Ltd v CenITex* [2013] VCAT 288 at [43]-[45].

Therefore, on the information before me, I do not consider the Applicant's request, in its current form, to be one that is reasonably manageable.

(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.

I note the Applicant's personal interest in obtaining access to documents that relate to their employment with and termination by the Agency. In these circumstances, I consider the Agency should take all reasonable efforts to provide the Applicant with access to the requested documents. However, 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.

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, while not 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 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 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.

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.

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.

31. 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

32. 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.

33. 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.
34. 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

35. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
38. 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.
39. 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.¹⁴

When this decision takes effect

40. 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.

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).