

Notice of Decision and Reasons for Decision

Applicant:	'BO4'
Agency:	Parks Victoria
Decision date:	19 May 2020
Provision considered:	Section 25A(1)
Citation:	'BO4' and Parks Victoria (<i>Freedom of Information</i>) [2020] VICmr 138 (19 May 2020)

FREEDOM OF INFORMATION – project documents – multiple FOI requests – substantial and unreasonable diversion of agency resources from other operations – consultation requirements under section 25A(6)

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

Notice of Decision

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

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

I am not satisfied the requirements for refusal to grant access to documents in accordance with section 25A(1) are met on grounds the Agency did not consult with the Applicant in accordance with the mandatory consultation requirement under section 25A(6).

Accordingly, the Agency is required to process the Applicant's request in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

19 May 2020

Reasons for Decision

Background to review

1. On [date], the Applicant made [multiple] FOI requests to the Agency seeking access to documents relating to the [named project]. These requests were received by the Agency on [date].
2. The Agency decided to characterise the [multiple] FOI requests as a single request. The Agency decided to do so as these requests all came from the same Applicant, in relation to the same subject matter [named project] and were lodged at the same time.
3. In its decision, dated [date], the Agency refused access to the documents in accordance with section 25A(1) on grounds the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
4. On the information before me, there does not appear to be any exchange of correspondence before the decision to refuse the request was made.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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) the Agency's submission dated [date]; and
 - (d) communications between OVIC staff, the Applicant and the Agency.
8. 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.

Intended fresh decision

9. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
10. On [date], the Agency notified the Applicant of its intention to make a fresh decision under section 49M.
11. Section 49M(2) states a fresh decision must be made within 28 days of this notification unless the agency and Information Commissioner agree in writing to another period.
12. On [date], the Information Commissioner agreed under section 49M(2) to a requested extension of time for the Agency to make its fresh decision by [date].

13. On [date], the Agency sought agreement from the Information Commissioner under section for a second extension of time to finalise its fresh decision. However, this request was made after the first agreed extension of time had expired. As a result, section 49MA(3) requires the Information Commissioner to recommence the review.
14. Accordingly, I am required to review the Agency's original decision, dated [date], which refused access to documents under section 25A(1).

Review of the application of section 25A(1)

15. 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).
16. Section 25A provides:
 - (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
 - (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.
...
 - (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... 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.

17. 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. ...

18. 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 an applicant's FOI request.²

19. 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.³

20. 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.⁴

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

21. A decision to refuse to process a request under section 25A(1) cannot be made unless an agency provides:

- (a) notice to an applicant stating its intention to refuse the applicant's request and nominates an Agency officer with whom the applicant can consult;
- (b) a reasonable opportunity for the applicant to consult; and
- (c) information to assist the applicant in amending their request to a form that would remove the proposed ground for refusal.⁵

22. In other words, if an agency refuses to process an FOI request under section 25A(1), it may do so only after the consultation requirements under section 25A(6) are met.

23. Having reviewed communications between the Applicant and the Agency prior to the Agency's decision under section 25A(1) to refuse the Applicant's FOI request, it is apparent the Agency did not

¹ [2001] VSCA 246 at [48].

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

³ *Ibid* at [11].

⁴ 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.

⁵ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

provide notice to the Applicant of its intention to refuse the request or provide the Applicant with a reasonable opportunity to consult with a view to removing the proposed grounds for refusal.

24. Accordingly, I am not satisfied the Agency did not meet the consultation requirements under section 25A(6) prior to refusing the request under section 25A(1).

Conclusion

25. On the information before me, I am not satisfied the requirements for refusal to grant access to documents in accordance with section 25A(1) are met on grounds the Agency did not consult with the Applicant in accordance with the mandatory consultation requirement under section 25A(6).
26. Accordingly, the Agency is required to process the Applicant's request in accordance with the FOI Act.

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁶
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
30. 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.
31. 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.⁹

When this decision takes effect

32. My decision does not take effect until the relevant review period for the Agency (stated above) expires.
33. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).