

## Notice of Decision and Reasons for Decision

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Applicant:	'BM5'
Agency:	Development Victoria
Decision date:	23 April 2020
Provision considered:	Section 25A(1)
Citation:	'BM5' and Development Victoria ( <i>Freedom of Information</i> ) [2020] VICmr 120 (23 April 2020)

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FREEDOM OF INFORMATION – meeting agendas – meeting minutes – board meetings – audit committee meetings – meeting packs – substantial and unreasonable diversion of agency resources from its other operations

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.

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

23 April 2020

## Reasons for Decision

### Background to review

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

Copies of the agenda and minutes for all meetings of the Board and the Audit Committee, from [date] to the date of this request [date]
2. On [date], the Agency wrote to the Applicant advising it intended to refuse to grant access to the documents sought under section 25A(1) as it considered the work required to process the request would substantially and unreasonably divert the Agency's resources from its other operations.
3. In accordance with section 25A(6), the Agency invited the Applicant to consult with a view to narrowing the scope of their request so as to remove the proposed grounds for refusal. The Agency provided the following suggestions for the Applicant's consideration:
  - (a) significantly reducing the time period covered by the request;
  - (b) seeking only that part of an agenda or minute that deals with a specific item or project; and
  - (c) other ways in which the Applicant thought the request might be limited in scope.
4. By letter dated [date], the Applicant responded to the Agency. In summary, the Applicant declined to narrow the scope of their request as they did not consider the request, in its current form, would substantially and unreasonably divert the Agency's resources from its other operations.
5. By letter dated [date], the Agency advised the Applicant of its decision to refuse the request under section 25A(1).

### Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
  7. The Applicant put forward to their views, as per their previous correspondence to the Agency that they did not consider the processing of the request would substantially and unreasonably divert the Agency's resources from its other operations.
  8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
  9. I have considered all communications and submissions received from the parties, including:
    - (a) the Agency's decision on the FOI request, dated [date];
    - (b) the Applicant's submission and information provided with the Applicant's review application, dated [date];
    - (c) the Agency's submissions dated [date] and [date];
    - (d) notes from my staff who inspected a sample of documents on [date]; and
    - (e) communication between OVIC staff, the Applicant and the Agency.
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10. 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)***

11. 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).
12. 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.

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

14. In *Chief Commissioner of Police v McIntosh*,<sup>2</sup> 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".

15. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and are to be given their ordinary meaning.

16. 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.<sup>3</sup>

17. In *McIntosh v Police*,<sup>4</sup> 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.

18. VCAT went on to observe, while precision is not required, the respondent agency in that case had not 'grappled with the question of what time and resources would be reasonably involved',<sup>5</sup> concluded there was 'no credible evidence of a large or unreasonable workload being generated by the request'.<sup>6</sup>

19. 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.<sup>7</sup>

20. 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.<sup>8</sup>

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

<sup>2</sup> [2010] VSC 439 at [32].

<sup>3</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

<sup>4</sup> *Ibid* at [21].

<sup>5</sup> *Ibid* at [29].

<sup>6</sup> *Ibid* at [26].

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

<sup>8</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

21. In conducting a review of 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 both substantially and unreasonably divert the Agency's resources from its other operations.<sup>9</sup>

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

22. 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 involve a substantial diversion of the Agency's resources from its other operations?*

23. In the Agency's consultation letter, it provided the following information regarding the estimated number of documents, time and staff resources required to process the request based on initial searches undertaken:
- (a) The documents likely to fall within the scope of your request (**Requested Documents**) are conservatively estimated to consist of at least 80 documents comprising 240 to 300 pages.
  - (b) Whilst I am able to identify the Requested Documents, the time and effort required to consider them is substantial. This difficulty arises due to the unqualified nature of your Request which does not relate to a single subject matter or topic.
  - (c) Each requested document involves multiple topics. I estimate that on average, there are approximately:
    - i. 7-8 agenda items in any Board Agenda;
    - ii. 7-8 items in any set of Board Minutes;
    - iii. 9-10 agenda items in any Audit Committee Agenda; and
    - iv. 9-10 items in any Audit Committee Minutes.
  - (d) In order to properly consider whether items referred to in the Requested Documents can be released, I will need to review the accompanying Board Paper or Audit Committee Paper and may need to make further internal enquiries (as described... below), so as to understand whether an item makes reference to matters that are exempt from disclosure (for instance, whether they include reference to information that is cabinet-in-confidence, or was otherwise obtained in confidence, or provided for deliberative processes, or in respect of which would be contrary to the public interest).
  - (e) I estimate 29 Board meetings and 11 Audit Committee meetings to have occurred during the period stated in your request.
  - (f) I also estimate that once I have identified all documents it will take approximately:
    - i. 40 minutes to assess each agenda item in any Board Agenda
    - ii. 80 minutes to assess each item in any set of Board Minutes
    - iii. 40 minutes to assess each agenda item in any Audit Committee Agenda
    - iv. 80 minutes to assess each item in any Audit Committee MinutesNote this does not include any time which may be required to conduct external consultation, as described in paragraph ... below.

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<sup>9</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.

- (g) Based on the above estimates, I estimate it would take a total of approximately 604 to 684 working hours for me to process the request.
- (h) Consistent with attendance to other priorities, I am able to devote only 2 hours per day to process this request. Accordingly, I estimate it will take approximately 302 to 342 working days to process the request.
- (i) In processing this Request, it will be necessary for me to consult with internal officers with knowledge and/or responsibility for each of the items in the agendas and minutes to facilitate an informed [decision] being made about whether any of those matters are exempt from access under the Act. That will include Group Heads and the relevant project teams responsible for dealing with individual projects referred to in the Requested Documents. These staff members have limited available time to respond to the Request consistent with attendance to their core responsibilities. Responding to FOI Requests forms only a small fraction of their day-to-day duties and the time to process the Request in its present form would divert them substantially and unreasonably from fulfilling their core roles.
- (j) In addition to the time required to consider Requested Documents internally, I will be required to consult third parties in relation to specific items. For example, it will almost certainly be necessary to consult with:
  - i. individuals in relation to the disclosure of personal affairs information, as required under section 33(1) of the Act;
  - ii. Other entities in relation to the disclosure of material containing trade secrets or business, commercial or financial information, as required under section 34(3) of the Act, or material obtained in confidence, as required under section 35(1A).

Undertaking this consultation will involve significant time in identifying the appropriate contacts, drafting and settling correspondence and arranging and attending telephone and in-person conferences.

- (k) Upon completing the required internal and external consultation, it will also be necessary for each of the Requested Documents to be considered and a final decision made on whether the relevant documents are exempt from disclosure taking into account all relevant facts and circumstances including the outcome of any consultation.
- (l) [The Agency] is adequately resourced to deal with the number of FOI request that it typically receives, usually in the order of 5 to 10 requests for a 12 month period (for reference, [the Agency] administered 9 FOI requests in 2017/18). I typically have the carriage of processing FOI requests. I also have other key responsibilities including the provision of governance and legal advisory services to the organisation, and I work 4 days per week. The FOI function usually takes up a very small proportion of my work, being less than one hour per week.
- (m) There is presently an unusually high spike in FOI requests, with [the Agency] currently dealing with 9 other FOI requests at various stages in the application and review process. Further, the [the Agency] legal team is very small, and I am the only decision maker authorised to made decisions under section 26 of the Act who presently has capacity to undertake the processing of your Request. These resources constraints compound the difficulty of responding to broad-based reports such as yours.
- (n) Accordingly, when all relevant time frames and steps required are considered and added to the estimates time I have set out above, the period required in order to made a decision in relation to your Request in its current form would clearly exceed the 30 day statutory response period and would, as things presently stand, divert this agency's resources substantially and unreasonably from its other operations.
- (o) To ensure that the Request was processed within the 30 day period, it would be necessary for [the Agency] to employ additional staff or external contractors at great expense, which the Act does not anticipate or require.

24. In its submissions, the Agency submitted the following:
- (a) it would take a total time within a range between approximately 604 to 684 working hours [to process the Applicant's request];
  - (b) it is estimated it would take approximately 302 to 342 working days to process the request;
  - (c) the estimate included internal but not external consultation;
  - (d) this is not a request for all documents about a particular subject matter or topic. This is a request for lots of different documents all of which inherently have multiple subject matters or topics; and
  - (e) the difficulty does not lie with identifying the relevant document. The difficulty lies with other aspects of processing the request given the nature of those documents.

***Issuing of notice under section 49KA(2)(a)***

25. Having reviewed the Agency's correspondence with the Applicant and the Agency's submissions, I was not able to determine whether the requirements of section 25A(1) were met based on the information before me.
26. Section 49KA(2)(a) provides that I may request an agency to process or identify a reasonable sample of documents to which a request relates (**Notice**).
27. On [date], I issued a Notice to the Agency requiring it to identify the following sample of documents to assist me in conducting my review:
- 1. [Multiple specified] Board meeting agendas;
  - 2. [Multiple specified] Board meeting minutes;
  - 3. [Multiple specified] Audit Committee agendas; and
  - 4. [Multiple specified] Audit Committee minutes.
28. In accordance with section 49KA(7), the Agency was also required to notify the Information Commissioner within 3 business days after the end of the period referred to in subsection (2) or (3) of the following information-
- (a) in the case of a notice under subsection (2)(a)-
    - (i) that the agency or Minister has processed or identified a reasonable sample of the documents; and
    - (ii) the nature of the documents processed or identified; and
    - (iii) whether the decision to refuse or grant access under section 25A(1) or 25A(5) is likely to be upheld.
29. On [date], OVIC staff attended the Agency to inspect the sample of documents.
30. Upon inspection, it was identified that each meeting agenda also contained a hyperlink to a 'Board Pack' associated with each meeting. I am satisfied the Board Packs fall within the terms of the Applicant's request and, based on the information before me, would significantly increase the number of pages the Agency would be required to locate and assess in accordance with the FOI Act.

31. I am also satisfied processing the Applicant's request, in its current form, would substantially divert the resources of the Agency from its other operations on grounds:
- (a) I accept the Agency's submission that 29 Board meetings and 11 Audit Committee meetings occurred during the period relevant to the Applicant's FOI request – a total of 40 meetings.
  - (b) In its submission, the Agency initially estimated the Applicant's request would encompass approximately 80 documents totalling 240 to 300 pages. However, this figure does not account for the Board Packs. On a conservative estimate of a 2 page meeting agenda, 6 pages of meeting minutes and 20 page Board Pack for each of the 40 meetings, I estimate the total number of pages relevant to the Applicant's request would exceed 1,120 pages.
  - (c) I accept the Board meeting minutes and Board Packs would cover a broad range of topics that the Agency FOI officer would need to assess and likely need to consult with other Agency staff to understand or clarify the nature, status and/or context of the documents sought given the diverse range of topics canvassed across the 40 meetings.
  - (d) If practicable, third party consultation would also be required to be undertaken, for example, with Agency FOI staff and external third parties in accordance with sections 33(2B) and 34(3).
32. Based on the information provided by the Agency and the inspection conducted of the sample of documents by OVIC staff, I am satisfied processing the Applicant's request, in its current form, would represent a substantial diversion of the Agency's resources from its other operations.

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

33. 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.<sup>10</sup>

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

- (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.

As outlined in the Agency's submission, the Agency is able to identify and collate the documents with 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

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

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



I accept the Agency has no dedicated FOI unit and the task of processing FOI requests is undertaken by staff in its Legal and Governance Group, who are tasked to undertake legal and governance matters.

At the time of my review, the Agency advised it has one active FOI request, three OVIC reviews and one staff member is responsible for managing FOI requests and reviews in addition to their other legal and governance duties.

The terms of the Applicant's request are not directed towards seeking access to documents concerning a specific topic or topics, or one or more subject matter. Based on the review of the sample of documents by OVIC staff and the Agency's submission, I accept the Board and Audit Committee meetings would encompass a broad range of topics that would be reasonably likely to include governance, contractual, financial, legal and deliberative matters.

I also accept the Agency's submission its staff would be required to undertake substantial internal consultation regarding the context of Board meeting minutes and the status of projects and topics recorded in the minutes.

As such, I consider the broad ranging nature of projects and topics captured by the request would require Agency staff to consult with a large number of persons both within and external to the Agency on a number of potential issues and considerations.

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

(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

As stated above, the Agency's initially estimated the Applicant's request would encompass approximately 80 documents totalling 240 to 300 pages. However, this estimate did not consider the associated Board Packs for each meeting, which I am satisfied also fall within the terms of the Applicant's request.

Upon realising each meeting had an associated Board Pack, which is hyperlinked within each meeting agenda, I estimate the number of documents falling within the Applicant's request to total 120 documents and based on the average size of Board packs viewed by my staff, I estimate that inclusive of Board packs the total number of pages falling within the terms of the Applicants request would be closer to 8000 pages.

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 as to remove the proposed grounds for refusal including providing the Applicant with:

- (a) a detailed explanation of the work involved in processing the request;
- (b) reasonable opportunities to revise the scope of the request; and
- (c) suggested reductions that would allow the Agency to process the request.

In the circumstances, I consider it was open to the Applicant to refine the scope of their request given the broad nature of the information 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

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

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

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

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

However, given the broad nature of the projects and topics likely to be contained within the documents sought, 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.

35. 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**

36. On the information before me, I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. Accordingly, I have decided to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(1).
37. 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**

38. 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>
39. 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>
40. 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>
41. 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.

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<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).

42. 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***

43. 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>15</sup> Sections 50(3F) and (3FA).