

Notice of Decision and Reasons for Decision

Applicant:	'BP9'
Agency:	Department of Justice and Community Safety
Decision date:	12 June 2020
Provision considered:	Section 25A(1)
Citation:	'BP9' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 152 (12 June 2020)

FREEDOM OF INFORMATION – brief titles list – 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 a document requested by the Applicant under the FOI Act.

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

12 June 2020

Reasons for Decision

Background to review

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

... For each Ministerial Office supported by the Department, a list of all briefs compiled, written and/or assigned by the Department to the Ministers Offices between [date] and [date].

I request that the list provide: the Ministers Office for which the brief was prepared, the title of the brief, and the brief reference number. ...

2. By letter dated [date], the Agency wrote to the Applicant in accordance with section 25A(6) notifying of its intention to refuse to grant access to documents in accordance with the request under section 25A(1) on grounds it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
3. The Agency's letter invited the Applicant to consult with an Agency officer in relation to rescoping the terms of the Applicant's request with a view to removing the proposed ground for refusal.
4. By letter dated [date], the Agency advised the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1), as the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision. The Applicant stated they did not receive the Agency's consultation letter dated [date].
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 Applicant and the Agency, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) the Agency's submission dated [date]; and
 - (d) communication 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.

Section 25A(1)

9. Section 25A(1) is an exception under the FOI Act that provides an FOI request may be refused in certain circumstances following an agency consulting with an applicant in accordance with section 25A(6).
10. Section 25A 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 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.- ...

11. In *Secretary, Department of Treasury and Finance v Kelly*,¹ the Victorian Supreme Court of Appeal described the purpose of section 25A(1) as:

...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

¹ [2001] VSCA 246 at [48].

between the object of the Act [in facilitating the individual's right of access to information] 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...

12. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and are to be given their ordinary meaning.
13. 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
14. Once an agency decides to refuse to grant access to a request under section 25A(1), it bears the onus of establishing it has met the requirements of the exemption.³

Consultation requirements under section 25A(6)

15. A decision to refuse a request under section 25A(1) cannot be made unless an agency gives notice to an applicant in accordance with section 25A(6). The agency must notify the applicant of its intention to refuse the request and nominate an agency officer with whom the applicant can consult, provide a reasonable opportunity for the applicant to consult and lastly, provide information to assist the applicant in amending their request with a view to removing the proposed ground for refusal.⁴
16. The Agency sent a letter dated [date] to the Applicant notifying of its intention to refuse to process the request, nominating an Agency officer with whom the Applicant could consult with a view to making the request in a form that would remove the ground for refusal.
17. The Applicant expressed concern they did not receive the Agency's consultation letter.
18. In response, the Agency advised its consultation letter dated [date] was posted to the Applicant. While I accept the consultation letter did not reach the Applicant, I accept the Agency's submission it sent this correspondence in accordance with the requirements of section 25A(6) before making its decision under section 25A(1).
19. In any case, I am satisfied OVIC staff facilitated consultation between the Applicant and Agency during the review. I note both parties showed a willingness to reach agreement on rescoping the terms of the request to enable it to be processed.
20. I understand the Applicant suggested a narrowed scope, which reduced the number of brief titles from more than 1,800 to approximately 1,200. However, the Agency advised the rescoped request continued to represent a substantial and unreasonable diversion of its resources from its other operations.
21. As no agreement was reached between the Agency and the Applicant as to rescoped terms for the Applicant's request, I am required to review whether the requirements of section 25A(1) are met in relation to the terms of the Applicant's original request.
22. In reviewing the Agency's decision, I am required to consider whether the requirements of section 25A are satisfied at the time of my review. That is, whether at the time of my decision, processing

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

³ *Ibid* at [11].

⁴ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

the request would substantially and unreasonably divert the Agency's resources from its other operations.⁵

Review of the application of section 25A(1)

23. In my review of this matter, I first consider whether processing the original request would involve a substantial diversion of the Agency's resources, and secondly whether processing the request would involve an unreasonable diversion of the Agency's resources.

Would processing the request involve a substantial diversion of the Agency's resources?

24. In estimating the resources involved in an agency deciding whether to refuse access under section 25A(1), the Victorian Civil and Administrative Tribunal (VCAT) has observed:⁶

...in asserting section 25A, an agency cannot be obliged to specify exactly how much time and energy would be spent by the agency in processing the request. Estimates only are acceptable, as to ensure precision would mean the agency would have to do the very work that section 25A is designed to prevent.

25. In summary, the Agency submitted the following in relation to processing the Applicant's request:
- (a) The Agency's FOI Unit currently comprises seven FOI officers.
 - (b) At the time of my decision, the Agency has approximately 250 FOI requests on hand.
 - (c) Processing the Applicant's request would involve an hour of search time, an hour to isolate the relevant documents, and a further hour to collate and index the documents.
 - (d) Given the subject matter of the request, the Agency would then be required to consult with numerous third parties to ascertain their views on disclosure of brief titles.
 - (e) The Agency estimates assessing each brief title would take an average of 15 minutes per title. This means assessing the entire document, which contains more than 1,800 brief titles in accordance with the FOI Act, would take an Agency officer approximately 450 hours (or approximately 60 working days or 12 weeks).
 - (f) This estimate is informed by the Agency's experience in processing similar FOI requests for lists of brief titles, which I understand have involved the processing of up to 100 brief titles per FOI request.
 - (g) Given the Agency's current workload and adapted working arrangements in response to COVID-19, which require Agency officers to work from home, the Agency has advised it has been operating at reduced capacity and speed. As such, it considers a 30 day extension of time to process the request would not allow sufficient time for the request to be processed.
26. I have considered the Agency's estimate of 15 minutes to process each brief title. I am of the view it is reasonably likely some of the titles could be processed more quickly. Therefore, I have considered the time involved if an assessment of each brief title took five minutes, rather than 15 minutes. I estimate assessing more than 1,800 brief titles would take an Agency officer approximately 150 hours (or approximately 20 working days or 4 weeks). In the circumstances, I consider this reduced

⁵ 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.

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

time estimate would also represent a substantial diversion of the Agency's resources.

27. On the information before me and given the large number of brief titles captured by the terms of the Applicant's request, I accept processing the request in its current terms would involve a substantial diversion of the Agency's resources from its other operations.

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

28. The meaning of 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, Local Government and Community Services*, in which the Commonwealth Administrative Appeals Tribunal held:

... it is not necessary to show ... that the extent of unreasonableness is overwhelming. It is this Tribunal's task to weigh up the considerations for and against the situation and to form a balanced judgement of reasonableness, based on objective evidence.⁷

29. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the approach adopted in *The Age Company Pty Ltd v CenITex*,⁸ in which VCAT considered the following factors in determining if a request would involve an unreasonable diversion of an agency's resources:

- (a) Whether the terms of the request offer a sufficiently precise description to permit [the agency], as practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort

I am satisfied the terms of the request are sufficiently precise to enable the Agency to locate the document sought by the Applicant and the time required to undertake a document search would not be unreasonable given the specific nature of the documents requested.

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

Consistent with the object of the FOI Act, there is a public interest in members of the public having a right to access information and documents held by government agencies unless it is necessary to refuse access under an exception or exemption in the FOI Act to protect 'essential public interests and the private and business affairs of persons in respect of whom information is collected and held'.⁹

However, in *Mildenhall v Department of Education*,¹⁰ VCAT held:

Section 25A seeks to balance competing interests. There is a public interest in an agency not being diverted from its core work through needing to process a very broad-ranging request for documents.

I acknowledge the Applicant's interest in seeking access to the document, as set out in their communications to the Agency and OVIC.

However, I am not satisfied the Applicant's interest in seeking access to the document, given the broad terms of the request and the large number of brief titles captured, outweighs the competing public interest in the Agency not being diverted from its core operations. This includes the need for the Agency to balance the competing demands of other FOI requests it currently has on hand, particularly in the context of its adapted working arrangements in response to COVID-19.

⁷ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

⁸ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

⁹ Section 3(1).

¹⁰ (unreported, VCAT, 19 April 1999) at [30].

- (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

At the time of my decision, the Agency advised it has approximately 250 FOI requests on hand.

I accept the Agency's current workload and adapted working arrangements has temporarily reduced its capacity and speed in the processing of FOI requests.

In the context of the Applicant's request, even adopting a reduced five minute time estimate for processing each of the 1800 brief titles would occupy an Agency staff member for approximately 150 hours (which equates to 20 working days or approximately four weeks).

Accordingly, I am satisfied the request is not a reasonably manageable one in the context of the Agency's current FOI workload, the adapted working arrangements in response to COVID-19 and resources available for dealing with FOI applications.

- (d) The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a cooperative approach to redrawing the boundaries of the application

I have reviewed the Agency's consultation letter dated [date]. I am satisfied its initial assessment of the request was reasonable, particularly given the large number of brief titles sought.

However, I note the Applicant's comments in their review application they did not receive the Agency's consultation letter dated [date], while the Agency maintains the letter was posted to the Applicant.

In any case, I am satisfied consultation with both the Applicant and the Agency was attempted during the review, but was unsuccessful.

Having engaged with OVIC staff and the Agency, I am satisfied the Applicant took a reasonably cooperative approach during the course of the review in attempting to redraw the boundaries of the request. However, as agreement on rescoped terms could not be reached, the Applicant elected to proceed with this review on the basis of the original terms of their request. While the Applicant had a right to do so, I consider had they been willing, for example, to further reduce the scope of their request, this may have allowed for the request to be processed.

- (e) The statutory time limit under the FOI Act for making a decision

Based on a reduced estimate for the work required to process the request, the number of FOI requests the Agency has on hand, and the resources available to the Agency to process FOI requests, I consider it would be reasonably likely the Agency would be unable to process the request and make a decision within the statutory timeframe limit.

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 time required for the Agency to examine the content of the document and consult with any person or body in relation to the request, based on its size means that, even with an extension of time granted, the Agency would not be able to process the request within a reasonable time.

30. Accordingly, given the large number of brief titles captured by the terms of the Applicant's request, I accept processing the request in its current terms would involve the unreasonable diversion of the Agency's resources from its other operations.

Conclusion

31. 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.
32. 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.
33. Despite my decision, I note it is open to the Applicant to make a new FOI request to the Agency for the information sought. In doing so, the Applicant may wish to reduce the scope of any new request by reducing the timeframe and/or by requesting a reduced list of brief titles. The Applicant could subsequently make further, suitably narrowed, FOI requests requesting additional brief titles from the Agency. However, I do not consider the Applicant would need to limit the scope of any future request to 100 brief titles only.

Review rights

34. 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
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
37. 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.
38. 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

39. My decision does not take effect until the relevant review period (stated above) expires.
40. 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).