

Notice of Decision and Reasons for Decision

Applicant:	'BR6'
Agency:	Department of Transport
Decision date:	24 June 2020
Provision considered:	Section 25A(1)
Citation:	'BR6' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 169 (24 June 2020)

FREEDOM OF INFORMATION – all emails to and from agency head – chief executive officer (CEO) — 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 request.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
24 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - The subject line, date, name of sender, and the names of the recipients of all emails to and from [Victorian Government authority] CEO [named individual] since the creation of that authority to the date of receipt of this request [relevant date]]; and
 - All emails to and from [named individual] over the same period sent to or originating from each of the Office of the Minister [named individual], [another Victorian Government agency] Chair [named individual] and the Office of the Premier.
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 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 emails dated [date] and [date], the Applicant responded to the Agency, declining to refine the scope of the request.
5. 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

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
7. The Agency was invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications 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;
 - (c) the Agency's submission dated [date]; and
 - (d) communication between OVIC staff, the Applicant and the Agency.
9. 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)

10. Section 25A(1) provides an FOI request may be refused in certain circumstances following an agency consulting with an applicant in accordance with section 25A(6).
11. 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....

12. 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 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...

13. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and are to be given their ordinary meaning.
14. 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 FOI request.²
15. 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 this provision.³

Consultation requirements under section 25A(6)

16. In accordance with section 25A(6), an 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 with the agency, and provide information to assist the applicant to amend their request with a view to removing the proposed ground for refusal.⁴
17. 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. In its letter, the Agency suggested the Applicant narrow the scope of their request.
18. In their response, the Applicant disagreed with the Agency's position that section 25A(1) applied and declined to narrow the scope of their request.
19. As no agreement was reached between the Agency and 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 request, as made to the Agency.
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 request would substantially and unreasonably divert the Agency's resources from its other operations.⁵

¹ [2001] VSCA 246 at [48].

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].

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.

Review of the application of section 25A(1)

21. In my review, I am required to first consider whether processing the Applicant's 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?

22. 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.

23. In summary, the Agency submitted the following in relation to processing the first dot point of the Applicant's request:
- (a) The Agency's FOI Unit currently consists of ten FOI officers who work the equivalent of 8.6 full time positions.
 - (b) At the time of my decision, the Agency has approximately 140 current FOI requests on hand.
 - (c) Document searches conducted in response to the first dot point of the Applicant's request identified 4525 emails. The Agency estimates it would take more than 75 hours to assess the spreadsheet for release, including redacting any exempt material.
 - (d) Given the subject matter of the request, the Agency would be required to consult with more than 300 third party individuals to ascertain their views on disclosure of their personal information. The Agency estimates for each individual consulted, preparation of the consultation materials from the list of emails would occupy an hour.
 - (e) This means assessing the entire list in accordance with the FOI Act, would take an Agency officer approximately 375 hours (or approximately 45 working days or nine weeks).
24. I have considered the Agency's estimate of one hour to prepare consultation materials from the list of email titles. I am of the view it is reasonably likely certain titles could be processed more quickly. Therefore, for the purposes of this review, I have assumed the time taken to assess each brief title would take half the time estimated by the Agency – i.e. 30 minutes, rather than one hour.
25. This means preparing for and conducting consultations with 300 individuals would take an Agency officer approximately 150 hours (or approximately 20 working days or four weeks). In the circumstances, I consider this reduced estimate of time would also represent a substantial diversion of the Agency's resources.
26. However, given the estimated number of persons to be consulted and hours involved, I am not persuaded it would be practicable for the Agency to consult with all third party individuals. Where consultation involves such a large number of individuals and would take such a substantial period of time, I consider it would be open to the Agency to exercise discretion and determine consultation is not practicable in the circumstances.
27. In weighing up the above considerations, in particular, the large number of emails captured by the first dot point in the Applicant's request and despite reducing the estimated time taken to process the 4525 emails identified as falling within this category of documents, I accept processing the

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

Applicant's entire request, in its current form, 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 concept 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 documents sought by the Applicant and the time required to undertake a document search would not be unreasonable given the 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

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 documents, as set out in their communications to the Agency and OVIC.

On the information before me, I am unable to ascertain if the Applicant has a specific purpose for seeking access to the requested documents. As such, I am not satisfied the Applicant's interest in seeking access to the documents, given the large number of emails captured by the terms of their request, outweighs the competing public interest in the Agency not being diverted from its core operations in order to process a request of this size. 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 current 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

Given the likely number of different topics and issues addressed in the 4525 emails identified as falling within this category of documents, I accept the work involved in the Agency assessing each document for release under the FOI would be significant.

Even adopting a reduced estimate for the time involved in processing the request, would involve a substantial period of time.

At the time of my decision, the Agency advised it has approximately 140 FOI requests on hand and 8.6 FTE FOI staff.

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

As I such, the request is not a reasonably manageable one in the context of the large number of documents captured by the terms of the Applicant's FOI request, the Agency's current FOI workload and adapted working arrangements and the impact of those necessary arrangements on the Agency's timeliness in processing FOI requests at this time.

- (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].

As discussed above, I have also considered the Agency's estimate of the number of persons to be consulted and the hours involved. However, I am not persuaded it would be practicable for the Agency to consult with all third party individuals in the circumstances.

However, while I am not persuaded by the initial estimate provided by the Agency, I am nevertheless satisfied the large number of documents captured by the terms of the Applicant's FOI request means the time involved in the Agency processing the request, in its current terms, would be unreasonable.

While the Applicant was invited to reduce the scope of their request, I note the Applicant declined the opportunity to do so. While I consider the Applicant was not obliged to reduce the scope of their request, narrowing the terms to a reduced number of emails, relevant time frame or specific topics, may have resulted in their request being processed.

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

Based on a reduced estimate for the work required for the Agency to process the request, the number of FOI requests the Agency currently has on hand, and the resources available to process those requests, I am satisfied 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 4525 emails means that, even with an extension of time granted, the Agency would not be able to process the request within a reasonable time.

30. In weighing up the above considerations, in particular, the large number of emails captured by the first dot point in the Applicant's request and despite reducing the estimated time taken to process the 4525 emails identified as falling within this category of documents, I accept processing the

Applicant's entire request, in its current form, would involve the unreasonable diversion of the Agency's resources from its other operations.

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

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 request.

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).