

Notice of Decision and Reasons for Decision

Applicant:	'CD8'
Agency:	Department of Transport (formerly VicRoads)
Decision date:	29 September 2020
Provision considered:	Section 25A(1)
Citation:	'CD8' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 284 (29 September 2020)

FREEDOM OF INFORMATION – CCTV footage – customer service centre – substantial and unreasonable diversion of agency's resources – personal affairs information – work involved in editing footage

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 the Agency editing the one hour of CCTV footage would substantially and unreasonably divert the resources of the Agency from its other operations.

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

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

29 September 2020

Reasons for Decision

Background to review

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

... All CCTV video footage of [specified date], time from [specified 1 hour time period]

Location VicRoads customer service centre

[named address]
2. Following consultation with the Agency, the Applicant clarified their initial request by confirming they seek access to CCTV footage capturing the inside of an Agency customer service centre.
3. The information sought by the Applicant relates to the Applicant's driver's licence application, and in particular, the quality of the finished image of the Applicant's signature on their licence.
4. The Agency advised the Applicant it was not able to process the request in its entirety and suggested alternative options to provide the Applicant with access to the key information sought. With a view to removing the ground for refusal under section 25A(1), the Agency invited the Applicant to consider narrowing the request and consulting with the Agency. The Applicant did not agree to narrow or amend the scope of their request.
5. The Agency proceeded to make its decision on the Applicant's request and refused to grant access to the documents in accordance with section 25A(1) on grounds the work involved in processing the one hour of CCTV footage (the **footage**) would substantially and unreasonably divert the resources of the Agency from its other operations.
6. However, the Agency identified 3:22 minutes of CCTV footage (the **shorter footage**) which it believes contains the specific information sought by the Applicant and granted access to an edited copy of the shorter footage with the faces of third parties edited using a filter to obscure the identity of those persons. As it is not possible to make a section 25A(1) decision in part, I consider the Agency released this shorter footage outside the FOI Act.
7. The Agency also released a copy of the Incident Report about this matter outside the FOI Act. The report was prepared by [named business undertaking], a third party service provider that processes driver licences on behalf of VicRoads. The Agency states the report aims to provide a thorough explanation to the Applicant as to how their drivers licence signature was processed.
8. In an attempt to resolve the matter, through its decision letter, the Agency invited the Applicant to attend one of its customer service centres to have their driver licence photo retaken and to re-sign their licence, at no cost.

Review

9. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the footage.
10. In their review application, the Applicant states they do not seek access to any personal affairs information, including information relating to the address, location or identity of third parties. However, during the review, the Applicant clarified they seek access to images of Agency officers captured in the footage.

11. Having viewed the footage, I accept the Agency's advice the shorter footage captures the Applicant's transaction at the customer service centre counter. I also note the camera is located behind Agency officers sitting at the counter and captures what appears to be a busy customer waiting area with a number of members of the public waiting to be called to the counter.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision letter in relation to the FOI request;
 - (b) the Applicant's submissions dated [date] and [date], and [date] and [date] and information provided with the Applicant's review application;
 - (c) the Agency's submissions dated [date], [date] and [date] and [date]; and
 - (d) all communications between this office, the Applicant and Agency.
14. 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.
15. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of application of section 25A(1)

16. As stated above, the Agency refused to process the Applicant's request for the one hour of footage on grounds the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
17. I also note the Agency's efforts to attempt to resolve this matter and that it provided a copy of the shorter footage and an Incident Report to the Applicant outside of the FOI Act.
18. In this matter, it is necessary to first consider whether the requirements of section 25A(1) are met.

Requirements of section 25A(1)

19. 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).
20. 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.

21. The Victorian Supreme Court of Appeal has 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... and the need to ensure that the requests under the Act did not cause substantial and unreasonable disruption to the day to day workings of the government through its agencies...¹

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

23. 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.²

¹ *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [48].

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

24. 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 a 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
25. In *McIntosh v Police*,⁴ the Victorian Civil and Administrative Tribunal (**VCAT**) states:

... 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.
26. 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.⁵
27. Further, prior to refusing a request under section 25A(1), an agency is required to notify an applicant of its intention to do so in accordance with section 25A(6). The agency must also nominate an agency officer with whom an 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.⁶
28. In the circumstances of this matter, I am satisfied the Agency made reasonable attempts to consult with and notify the Applicant to assist them in removing the ground for refusal as required under section 25A(6) and extended to an attempt to address and resolve the Applicant's broader complaint.
29. Despite the attempted consultation undertaken, the Applicant and Agency did not reach agreement as to rescoped terms for the Applicant's request.
30. Accordingly, 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 at the time of my review. That is, whether at the time of my decision, processing the Applicant's request would substantially and unreasonably divert the Agency's resources from its other operations.⁷
31. 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?

³ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

⁴ *Ibid* at [21].

⁵ *Ibid* at [11].

⁶ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

⁷ 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.

32. 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:⁸
- ... 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.
33. In summary, prior to my decision, the Agency submits the following in relation to the resources and time it estimates would be required to process the Applicant's request:
- (a) The Agency's FOI Unit, which also has privacy functions, comprises ten officers with a 'Full Time Equivalent' or 'FTE' of 8.6 officers;
 - (b) The Agency is currently processing around 120 FOI requests.
 - (c) The FOI Unit generally processes around 110 FOI requests per month and processing of requests is undertaken concurrently.
 - (d) Staffing is currently impacted by COVID-19 pandemic restrictions in place in Victoria.
 - (e) The process required to de-identify footage involves the use of [named] software, which is not merely mechanical, but requires the assessing officer to make decisions on what areas need to be blurred to prevent unreasonable disclosure.
 - (f) The Agency estimates processing 10 minutes of CCTV footage would take 4 hours. This estimate is based on the assessing officers' previous experience with such requests. Taking that experience as a guide, it would take around 20 hours to process the 60 minutes of footage. That would involve almost three full time days for an assessing officer dedicated solely to this task.
 - (g) This estimate may be conservative and could be significantly increased due to the high number of individuals visible in footage at the Agency customer service centre. Processing would also have to occur in the time available, which would be limited by the need to address other FOI requests.
 - (h) The FOI Unit staff, who are currently working remotely from home, do not have access to the required [named] software which is accessible in the Agency's office only.
34. I acknowledge the Agency's current adapted working arrangements, due to COVID-19, are impacting the Agency's ability to process FOI requests, particularly where the Agency requires access to hard copy documents or software systems not available in their current remote working environment.
35. I accept the Agency's conservative estimate that it would take a dedicated assessing officer 20 hours to process the requested footage. I agree this time estimate represents a large number of hours in the context of this matter and the current workload experienced by the FOI unit.
36. On the information before me, I am of the view the time required to process the requested footage would involve a substantial diversion of the Agency's resources from its other operations.
37. Accordingly, I am satisfied the first requirement for section 25A(1) is met and processing the Applicant's request would involve a substantial diversion of the Agency's resources.

⁸ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

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

38. The concept of 'unreasonableness' was considered by the Commonwealth Administrative Appeals Tribunal, which 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

39. In determining 'unreasonableness' for the purposes of section 25A(1), I have had regard to the approach adopted by VCAT, which considered the following factors in determining if a request would involve an unreasonable diversion of an agency's resources:¹⁰

- (a) Whether the terms of the request offer a sufficiently precise description to permit the Agency, as a 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.

- (a) The public interest in the disclosure of the document 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 in order to protect 'essential public interests and the private and business affairs of persons in respect of whom information is collected and held'.¹¹

In *Mildenhall v Department of Education*,¹² VCAT held:

Section 25A seeks to balance competing interests. There is a public interest in 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 footage. However, having considered the Agency's attempts so far to assist the Applicant to resolve their complaint, I am not satisfied their personal interest in seeking access to the footage outweighs the competing public interest in the Agency not being diverted from its core operations in order to process an FOI request of this size. This includes the need for the Agency to balance competing demands in relation to its functions and other operational responsibilities. I consider these factors are compounded by the current adapted working arrangements with which the Agency is required to comply during the COVID-19 pandemic.

- (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 requests

Based on the information before me, I accept the estimate of resources and time required for the Agency to process the request in its current terms, means the request is not a reasonably manageable one. As referenced above, I also consider these factors are compounded by the

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

¹⁰ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

¹¹ Section 3(1).

¹² (unreported, VCAT, 19 April 1999) at [30].

current adapted working arrangements which I accept would reasonably impact on the resources usually available to Agency for dealing with FOI requests.

- (c) 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 request

The intention of the consultation requirement under section 25A(6) is to provide for a reasonable exchange of information and negotiation between an agency and an applicant in relation the terms and scope of the applicant's request.

Having reviewed the exchanges between the Applicant and the Agency in relation to this request, I am satisfied the Agency responded reasonably to the Applicant's request. This included attempting to provide the Applicant with a reasonable opportunity to revise the terms of their request, providing suggestions to assist the Applicant to narrow the scope of the request and ultimately providing the Applicant with relevant information outside of the FOI Act.

While the Applicant was not obliged to do so, I note the Applicant declined the opportunity to narrow the scope of their request or explore alternative means of resolving their concerns.

- (d) The statutory time limit for making a decision in this application.

Based on the estimate for the work required to process the request, the current limited access to required editing software and the resources available to the Agency to process FOI requests, in particular a request of this size, I am satisfied the Agency would be unable to process the request and make a decision within the statutory timeframe.

While section 21(2) provides for the Agency to seek agreement from the Applicant for an extension of time, I consider the time required for the Agency to edit the CCTV footage in relation to the request, means that, even with an extension of time, the Agency would likely not be able to process the request within a reasonable timeframe.

40. Having considered the above factors, I am satisfied processing the Applicant's request in its current terms would involve an unreasonable diversion of the Agency's resources from its other operations.
41. Accordingly, I am satisfied the second requirement for section 25A(1) is also met and processing the request involve an unreasonable diversion of the Agency's resources.

Conclusion

42. On the information before me, I am satisfied the work involved in the Agency editing the one hour of CCTV footage would substantially and unreasonably divert the resources of the Agency from its other operations.
43. Accordingly, I am satisfied the requirements for refusal to grant access to the footage in accordance with the Applicant's request under section 25A(1) are met and the Agency is not required to process the Applicant's request in its current form.

Review rights

44. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³

¹³ Section 50(1)(b).

45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
46. 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.
47. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application to VCAT is made for a review of my decision.¹⁵

¹⁴ Section 52(5).

¹⁵ Sections 50(3F) and (3FA).