

Notice of Decision and Reasons for Decision

Applicant:	'BW7'
Agency:	Victoria Police
Decision date:	6 August 2020
Provision considered:	Section 25A(1)
Citation:	'BW7' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 218 (6 August 2020)

FREEDOM OF INFORMATION – law enforcement documents – police documents – internal correspondence – substantial and unreasonable diversion of agency resources from other operations – not substantial and unreasonable

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

Notice of Decision

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

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

I am not satisfied the work involved in processing the Applicant's request would substantially and unreasonably divert the resources of the Agency from its other operations.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

6 August 2020

Reasons for Decision

Background to review

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

Copies of all forms of written correspondence – sent and received – (emails, letters, text messages, telephone notes, diary notes or otherwise) between Senior Constable [named officer, ID number] of [named] Police Station and Constable [named officer, ID number] of [named] Police Station, starting on [date] and ending on [date], in relation to my arrests, criminal charges, bail applications/revocations and my sentence's appeal application/outcome.
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 Applicant was invited to consult with the Agency with a view to removing the proposed grounds for refusal by refining the scope of the request. The Applicant declined the invitation to refine the terms of their request.
4. In its decision letter dated [date], the Agency notified the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1).
5. I note the current request follows an earlier 20 point request made by the Applicant in [year], which was refused by the Agency under section 25A(1) and subject to review. The current request terms are consistent with one point of the Applicant's previous 20 point request (see paragraph 18 for further details).

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) communications between OVIC staff, the Applicant and the Agency
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.
10. Further, I note Parliament's intention the FOI Act be interpreted so as to further the object of the Act and 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

Section 25A(1)

11. 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).
12. Section 25A provides:

25A Requests may 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
 - (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... 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 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... 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*,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 individuals right of access to information] 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.

- 14. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and are to be given their ordinary meaning.
- 15. 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
- 16. Once an agency has decided 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)

- 17. 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 a 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 to amend their request with a view to removing the proposed ground for refusal.⁴
- 18. As noted in paragraph 5 above, the Applicant made a previous 20 point request to the Agency on [date] for access to information. This request was subsequently refined by the Applicant following consultation with OVIC staff and the Agency to four points of information in [month year]. After further consultation with OVIC staff and the Agency, the Applicant further narrowed the scope of their request to a single point of information, which is consistent with the scope of this current request. In the previous request, the Agency did not agree to process the single point request. As the OVIC review was then to be conducted on the initial 20 point request, the Applicant withdrew their application for review with OVIC in [month year].
- 19. On [date], the Applicant lodged a second FOI application with Victoria Police, requesting access to the single point of information mentioned above.
- 20. By letter dated [date], the Agency advised the Applicant of its intention to deny access to documents under section 25A(1) as it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Agency nominated an officer with whom the Applicant could consult with a view to making the request in a form that would remove the ground for refusal.

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].

21. On [date], the Applicant wrote to the Agency declining to refine the scope of their request.

Review of application of section 25A(1)

22. 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?

23. 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:

...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.

24. The Agency submits the following in relation to the estimated work involved in processing the Applicant's request:

- (a) Preliminary searches were conducted to determine the work involved in processing the request.
- (b) The relevant police member estimated it would take them in excess of 6 hours to search for the relevant documents and collate them for the Agency's FOI Unit. A second member would be required to search through the emails falling within the scope.
- (c) This estimate does not consider the time required for the FOI Unit to assess the documents.
- (d) As at [date], the Agency's FOI Unit:
 - (i) had 786 active FOI requests, including 354 overdue requests;
 - (ii) comprised 20 staff with five positions vacant; representing a 20% reduction in staff capacity; and
 - (iii) continued to be working remotely as a result of the COVID-19 pandemic which has impacted time required to process requests.

25. The Agency further advises front line police members are impacted by COVID-19-related duties, resulting in a reduction in response times to requests from the FOI Unit.

26. The FOI Unit has not provided an estimation of the time required to assess the documents and process the request following the initial searches.

27. While I acknowledge the impact of COVID-19 and have considered the Agency's advice it would likely take one staff member approximately six hours to search and collate relevant documents and potentially a similar amount of time for a second Agency staff member to conduct a search, I am not satisfied the work involved in processing the request would be substantial.

28. Accordingly, on the information before me, I am not satisfied the Agency processing the Applicant's request would substantially divert the resources of the Agency from its other operations.

29. the Agency processing the Applicant's request would substantially divert the resources of the Agency from its other operations.

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

30. 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 necessary to show... that the extend of unreasonableness is overwhelming. It is this Tribunal's task to weigh up considerations for and against the situation and to form a balanced judgement of reasonableness based on objective evidence.⁵

31. 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*,⁶ in which VCAT considered the following factors in determining if a request would involve an unreasonable diversion of 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 documents sought within a reasonable time and with the exercise of reasonable effort

I consider the clear terms of the request and nature of the documents sought are sufficiently precise to enable the Agency to locate the documents sought by the Applicant within a reasonable time and with the exercise of reasonable effort.

I also note that in the spirit of refining the scope of their request to remove the ground for refusal, the Applicant previously narrowed their request for information down from 20 points to 1 point.

- (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'.⁷

I acknowledge the Applicant holds a strong personal interest in obtaining access to the documents. On the information before me, I am not satisfied that processing the request would substantially divert the Agency from its core operations. Consequently, the public interest lies in individuals being able to access official records held by an agency which concerns them.

- (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 available for dealing with FOI applications

At the time of my review, the Agency is processing over 780 FOI requests, including a large number of overdue requests. Currently, there are 20 staff members in the Agency's FOI Unit, which is a 20% reduction in capacity.

I acknowledge the large number of FOI requests the Agency s and the reduced staff resources to process those requests. I also acknowledge the compounding impact of the COVID-19 pandemic on the Agency's ability to process requests at the same rate it has done so

⁵ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

⁶ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

⁷ Section 3(1).

previously. However, I do not consider the time required for the Agency to process the requested documents is unreasonable in the circumstances.

In my view, notwithstanding the impacts of the Agency's current remote working arrangements, I am satisfied the request is a reasonably manageable one.

- (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 accept the Agency's initial assessment of the work involved in locating relevant documents.

Having reviewed correspondence between the Agency and the Applicant, I am satisfied the Agency provided options for the Applicant to narrow the scope of their request, including the option to reduce the timeframe for the request to an eight week period.

On this occasion, the Applicant refused to narrow the scope of their request. However, an applicant is not bound to accept an agency's proposed ground for refusal under section 25A(1).

I also note, the Applicant's willingness to meaningfully consult and narrow the scope during their initial FOI request to the Agency in [year], reducing their original 20 point request to one point of information and material, which forms the scope of their current request.

In the circumstances of this matter, I do not consider the Applicant's refusal to reduce the time period sought is indicative of the Applicant not taking a cooperative approach to redrawing the boundaries of the application.

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

I am satisfied the Agency would be able to process the request within the statutory time limit for making a decision under section 21. In any case, in the event processing the request would require more time, section 21(2) provides for the for extensions of time which the Agency could either rely upon and/or for which the Agency could request the agreement of the Applicant. Accordingly, I do not accept the statutory time limit is a barrier to the Agency processing the request.

32. Having considered the above factors and on the information before me, I am not satisfied the Agency processing the Applicant's request would unreasonably divert the resources of the Agency from its other operations.

Conclusion

33. On the information before me, I am not satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
34. Accordingly, I am not satisfied the requirements for refusal to grant access to documents in accordance with the Applicant's request under section 25A(1) are met, and the Agency is required to process the Applicant's request.

Review rights

35. If the Agency is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁸

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
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.¹⁰

When this decision takes effect

39. My decision does not take effect until the Agency's 14 day review period expires.

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).