



Office of the Victorian
Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

Applicant:	'CN2'
Agency:	Victoria Police
Decision date:	12 January 2021
Provision considered:	Section 25A(1)
Citation:	'CN2' and <i>Victoria Police (Freedom of Information)</i> [2021] VICmr 10 (12 January 2021)

FREEDOM OF INFORMATION – law enforcement documents – police documents – CCTV footage –
– substantial and unreasonable diversion of Agency resources

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, I am satisfied 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

12 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency, the terms of which they subsequently clarified to seek access to the following documents:
 - All documents regarding repeated calls to the [suburb] Police Station claiming I have breached a personal safety order and subsequent (inappropriate) police attendances at the premises without a warrant including listing a pending charge which no information has been provided on for [time period] and no summons nor any details were ever received and no it has not been removed.
 - Information about police reports [report number].
 - Information about police reports [report number] including a copy of CCTV received by the Station from [description of third party].
2. By correspondence 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. On [date], the Applicant responded to the Agency, declining to refine the scope of the request.
5. On [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 and submissions received from the parties, including the Applicant's response to the preliminary view provided.
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. I note Parliament's intention the FOI Act must 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.

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 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....

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

¹ [2001] VSCA 246 at [48].

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 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 FOI request.²
16. 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)

17. 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
18. The Agency sent a letter dated [date] to the Applicant notifying of its intention to refuse to process the request and 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 by removing or significantly reducing the timeframe for the CCTV footage sought.
19. In their response, the Applicant disagreed section 25A(1) applied and declined to narrow the scope of their request.
20. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access, provided a reasonable opportunity for the Applicant to consult with the Agency and provided sufficient information to assist the Applicant in making their request in a form that would remove the proposed ground for refusal.

Scope of my review

21. During this review, OVIC staff provided the Applicant with an initial view that the requirements of section 25A(1) were likely to be met and invited the Applicant to narrow the scope of their request and/or to provide further submissions to support a contrary view.
22. The Applicant provided further submissions and advised OVIC staff they agreed to narrow the length of CCTV footage sought to a 24 hour period. However, the Applicant also sought to amend the scope of their request to include all records held by the Agency relating to the Applicant from a specific date.
23. As no agreement was reached between the Agency and Applicant as to narrowed terms for the Applicant's request, I am required to determine whether the requirements of section 25A(1) are met in relation to the terms of the Applicant's clarified request, as set out in paragraph 1 above.

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].

24. In conducting a review, 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

Review of the application of section 25A(1)

25. Firstly, I am required to determine whether processing the Applicant's request would involve a substantial diversion of the Agency's resources.
26. Secondly, I am required to determine whether processing the request would also involve an unreasonable diversion of the Agency's resources.

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

27. 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.

28. 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 with material identified as falling within the scope of the Applicant's request including Law Enforcement Assistance Program (**LEAP**) incident reports, handwritten notes, correspondence, a brief of evidence, body-worn camera footage and CCTV footage.
 - (b) The CCTV footage received by the Agency from [description of third party] is approximately 48 hours in length and was taken from several angles.
 - (c) A member of the Agency's FOI Unit would be required to view the 48 hours of footage to assess whether it could be released or was subject to any exemptions under the FOI Act. This would take at least 48 hours.
 - (d) Based on the Agency's time estimate of at least 48 hours, it would take an Agency officer working full-time over six working weeks to process the Applicant's request.
 - (e) The Agency states its 'current capacity' to process CCTV footage is for a duration of approximately 30 minutes per FOI request only.
 - (f) The Agency's time estimate does not take into account the time required for its FOI Unit to assess the related LEAP incident reports, handwritten notes, correspondence, a brief of evidence and body-worn camera footage.
29. The Agency's FOI Unit did not provide an estimate of the time required to assess and process the non-CCTV documents. However, it advises police members are impacted by COVID-19-related duties, resulting in a reduction in response times to requests for documents and information from the FOI Unit.

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].

30. Putting aside the Agency's submission it has capacity to process up to 30 minutes of CCTV footage only, even if it were possible for the Agency to view and assess the CCTV footage in an accelerated format and the Applicant's request was reduced to 24 hours of footage only (as suggested by the Applicant), I accept processing the request would still involve a substantial amount of the Agency's time and resources at this time.
31. Having considered the Agency's advice regarding the length of CCTV footage required to be reviewed, I accept the work involved in the Agency processing the Applicant's request would be substantial.
32. Accordingly, on the information before me, I am satisfied the Agency processing the clarified 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?

33. 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

34. 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 clarified request are sufficiently precise to enable the Agency to locate the requested documents 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

Members of the public have a right to access official documents unless there is a compelling reason to refuse access.

I note the Applicant has a personal interest in obtaining access to the documents for legal proceedings.

While I accept the subject matter of the request is important to the Applicant, I do not consider there is a broader interest shared by the public that would be served by disclosure of the documents in this matter.

- (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

The Agency submits the request is not reasonably manageable due to the amount of work involved in reviewing the requested CCTV footage.

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].

I consider the request is not a reasonably manageable one in the context of a request for 48 hours of CCTV footage given the Agency's current FOI workload, available staff resourcing, adapted working arrangements due to the COVID-19 pandemic and the impact of those 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].

Despite my comments above, which concern the potential for the Agency's FOI Unit to accelerate viewing the requested CCTV footage, I broadly accept the Agency's initial assessment of the work involved in processing the Applicant's request is not reasonable due to length of the footage and the need for it to be viewed from different angles.

Correspondence between the Agency and the Applicant, sent prior to the Agency's decision, shows the Applicant declined to narrow the terms of their request following advice from the Agency that the requested CCTV footage is 48 hours in length.

I am satisfied the Agency responded reasonably to the Applicant's request, by providing a reasonable opportunity for the Applicant to revise the scope of their request and by providing suggested wording that would allow the Agency to process the request.

In consultation with OVIC staff during the review, I note the Applicant was agreeable to narrowing the length of CCTV footage sought to a specific date only. However, as detailed above, the Applicant also expanded the scope of their request to include other documents.

OVIC's attempts to contact the Applicant to further discuss the scope of their request have been unsuccessful.

In any case, I am not satisfied the Applicant's agreement to seek 24 hours of CCTV footage only would be sufficient to reduce the work involved in the Agency viewing and assessing the footage for relevance and release.

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

Based on the estimate for the work required for the Agency to process the request, the high 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 work involved in processing the CCTV footage means that, even with an extension of time, the Agency would not be able to process the request within a reasonable timeframe.

35. Having considered the above factors, I am satisfied processing the request would involve an unreasonable diversion of the Agency's resources.

Conclusion

36. 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.

37. 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.
38. Despite my decision, it is open to the Applicant to make a new FOI request to the Agency seeking access to documents regarding the Applicant excluding the requested CCTV footage the Agency obtained from [description of third party]. It may be, that by first reviewing any documents released to the Applicant, they may be able to request with greater specificity the CCTV footage sought with a view to avoiding a further refusal by the Agency under section 25A(1).

Review rights

39. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
41. 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.
42. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application to VCAT for a review of my decision is made.¹¹

When this decision takes effect

43. My decision does not take effect until the Applicant's relevant review period (stated above) expires.
44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁹ Section 50(1)(b).

¹⁰ Section 52(5).

¹¹ Sections 50(3F) and (3FA).