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Notice of Decision and Reasons for Decision

Applicant:	'CT6'
Agency:	State Revenue Office
Decision date:	15 March 2021
Provision considered:	Section 25A(1)
Citation:	'CT6' and State Revenue Office (<i>Freedom of Information</i>) [2021] VICmr 70 (15 March 2021)

FREEDOM OF INFORMATION – invoices – external legal services – 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

15 March 2021

Reasons for Decision

Background to review

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

Copies of all the following document and information in your possession for the following period [date] to present:
 1. How much the SRO has spent on legal matters involving [specified person].
 2. How much the SRO has been billed, but not yet paid, for legal matters involving [specified person].
 3. A copy of all invoices that refer or relate to [specified person].
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. In response, the Applicant provided a list of [specified number of] legal proceedings to aid the Agency.
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), noting the list of legal proceedings provided by the Applicant had not narrowed the scope of their original request.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. During the review, the Agency was provided with my preliminary view that I was not satisfied the requirements of section 25A(1) had been satisfied and given an opportunity to respond. The Agency provided a further confidential submission in support of its position.
8. I have considered all communications and submissions received from the parties.
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.

Review

Refusal of a request in accordance with section 25A(1)

11. Section 25A(1) is an exception under the FOI Act that provides an FOI request may be refused in certain circumstances following an agency's consultation with an applicant in accordance with section 25A(6).
12. Specifically, section 25A provides:
 - (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.
...
 - (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. The Victorian Supreme Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*,¹ 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...

14. The Supreme Court of Victoria has held 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

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 the exemption. Namely, processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.³

16. 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 FOI request would substantially and unreasonably divert the Agency's resources from its other operations.⁴

Consultation under section 25A(6)

17. A decision to refuse to process a request under section 25A(1) cannot be made unless an Agency provides notice to an Applicant stating its intention to refuse the applicant's request and nominates an Agency officer with whom the Applicant can consult, provides a reasonable opportunity for the Applicant to consult and lastly, provides information to assist the Applicant in amending their request to a form that would remove the proposed ground for refusal.⁵

18. I am satisfied, before making its decision, the Agency provided the Applicant notice of its intention to refuse access, provided a reasonable opportunity to consult and provided sufficient information to assist the Applicant in making the request in a form that would remove the proposed ground for refusal. I note that while the Applicant did provide further clarification to their original request, this did not narrow the scope of their FOI request in practical terms.

¹ [2001] VSCA 246 at [48].

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

³ *Ibid* at [11].

⁴ 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 & Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

⁵ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

Review of the application of section 25A(1)

19. Following consultation between an agency and an applicant under section 25A(6) and where an agency and an applicant do not reach agreement as to a revised scope for the applicant's FOI request, I must complete my review based on the applicant's original request.

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

20. When determining whether to refuse a request, it is possible for an agency to estimate how much time and effort would be spent to refuse the request only. 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.⁶
21. In its consultation letter and decision letter, the Agency provided the Applicant with details regarding the quantity of documents relevant to their request and the estimated time and staff resources required to process it as summarised below:
- (a) there are more than 80 relevant invoices, amounting to approximately 450 pages;
 - (b) the Agency estimated the time it would take to identify relevant invoices, collate them and remove any duplicates or irrelevant material as at least six days;
 - (c) based on consultation undertaken for similar requests made by [redacted], the Agency estimated approximately 50 individuals and up to 10 agencies or business undertakings would need to be consulted involved, which would take four days, based on 30 minutes per third party consultation;
 - (d) the Agency estimated the time it would take to assess and redact the estimated 450 pages of documents as five days based on five minutes per page;
 - (e) the Agency estimated the time it would take to process the request in its current form would take approximately 15 business days;
 - (f) at the date of the Applicant's request, the Agency had 10 active FOI requests.
22. I further note the following excerpt from the Agency's decision letter to the Applicant:

The searches required to identify all relevant invoices and capture the details you request are time-and resource-intensive because the [Agency] does not record whether an invoice relates or refers to a proceeding or advice matter involving [a specified person] when details of an invoice are entered on the [Agency's] financial management system. Consequently, multiple searches are required to identify and review all relevant invoices and capture the requested information about expenditure.

23. On the information before me, including the volume of other similar requests received by the Agency, the estimates regarding the documents captured in this request and amount of Agency time required to process it, this request would involve a substantial diversion of the Agency's resources.

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

24. The term 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, local Government and Community Services*, where the Commonwealth Administrative Appeals Tribunal held:

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

...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

25. In determining 'unreasonableness' for the purposes of section 25A(1), I have had regard to the approach adopted by the Victorian Civil and Administrative Tribunal (VCAT) in *The Age Company Pty Ltd v CenITex*,⁸ in which VCAT considered relevant factors when determining if a request involves an unreasonable diversion of an agency's resources. I consider these factors below in the context of this matter (examples below):

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

- (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

I acknowledge the Applicant holds a strong personal interest in obtaining access to the documents. As detailed above, I am not satisfied that processing the request would substantially divert the Agency from its core operations. Consequently, I see 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 usually available for dealing with FOI applications

At the time of my review, the Agency is processing six FOI requests. While I acknowledge the resources available for dealing with FOI applications as set out in detail in the Agency's confidential submission, I do not consider the time required for the Agency to process the requested documents is unreasonable in the circumstances.

I am therefore 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 co-operative approach to redrawing the boundaries of the application

I accept the Agency's initial assessment of the work involved in locating relevant documents, noting the technical limitations discussed above concerning the financial management systems.

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.

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).

On this occasion, the Applicant's proposal did not 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) and I do not consider the Applicant's refusal to reduce the time period or number of proceedings is indicative of the Applicant not taking a cooperative approach to redrawing the boundaries of the application.

(e) The statutory time limit for making a decision in this application

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.

26. Having considered the above factors, I am not satisfied the diversion of resources would also be unreasonable in this matter.

Conclusion

27. 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.
28. 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

29. 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.¹⁰
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
31. 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.
32. 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.¹²

When this decision takes effect

33. My decision does not take effect until the Agency's 14 day review period expires.
34. In the event the Agency does not seek review from VCAT, I consider its 28 days to complete the request would commence following the expiry of the Agency's review period. I note it is open to the Agency to seek an extension of time from the Applicant to process the request, if required.

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).