

## Notice of Decision and Reasons for Decision

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Applicant:	'DT7'
Agency:	Fire Rescue Victoria
Decision date:	13 October 2021
Provision considered:	Section 25A(1)
Citation:	'DT7' and Fire Rescue Victoria (Freedom of Information) [2021] VICmr 305 (13 October 2021)

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FREEDOM OF INFORMATION – 25A(6) – intention to refuse access – reasonable opportunity to consult – as far as practicable provide information to applicant to assist making a request – requirements to refusal not met

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.

I am not satisfied the requirements for refusal to grant access to documents in accordance with section 25A(1) are met, on grounds the Agency did not consult with the Applicant in accordance with the mandatory consultation requirements under section 25A(6).

Accordingly, the Agency is required to process the Applicant's request in accordance with the FOI Act.

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

13 October 2021

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency for access to the following documents:

Emails containing one or more of the key words 'uniform', 'senior officer', 'epaulette' and 'gold' received or sent by the following people between [date] and the date of this request: - [name] - [name] - [name] - [name] – [name] - [name]. For the purposes of clarity, the above scope should apply to emails sent or received by those people when they were employees of the entities known as the Metropolitan Fire and Emergency Services Board and / or Fire Rescue Victoria.
2. On [date], the Agency wrote to the Applicant requesting clarification of the request. The Agency asked the Applicant whether they are seeking attachments to the emails sought, and whether they are seeking access to emails where the key words are mentioned anywhere in an email or in the subject line only.
3. That same day, the Applicant advised the Agency they do seek the attachments, and that searches for keywords should be for both the body and the subject line of emails.
4. On [date], the Agency wrote to the Applicant, in accordance with section 25A(6), advising that it intended to refuse to process the request on grounds it is satisfied the work involved in processing the request would divert its resources substantially and unreasonably from its other operations. The Agency offered the following advice to assist the Applicant make their request:
  1. [the Applicant] may wish to revise or narrow the scope of the key words included in the request;
  2. [the Applicant] may wish to revise [their] request from key words to be identified within the subject line and the body of the email to subject line and/or the body of the email;
  3. [the Applicant] may wish to reduce the timeframe for the request so that it covers a narrower or limited period of time;
  4. [the Applicant] may wish to specify any kinds of information [they] [do] not seek or which [they are] willing not to receive if the documents are disclosed to [them];
  5. [the Applicant] may wish to agree for [Fire Rescue Victoria] to process only the unique email/s at the end of an email chain, rather than all duplicate email chains.
5. On [date], the Applicant revised the scope of their request in accordance with the Agency's advice:
  1. [the Applicant] is happy to remove the key words 'uniform' and 'senior officer' from the request. All other key words are to remain, those being 'epaulette' and 'gold'.
  2. [the Applicant] agrees to vary the request so that key words are to be identified within the subject line and / or body of the email.
  3. [the Applicant] agrees to vary the timeframe of the requests so that it covers the period [date] to [date].
  4. [the Applicant] does not seek phone or fax numbers, residential addresses, business addresses, email addresses within any document(s) disclosed.
  5. [the Applicant] agrees for FRV to process only the unique email/s at the end of an email chain, rather than all duplicate email chains, provided that such email chains released contain all emails that had been sent within that chain. That is, if there is an email chain of 6 related emails (1, 2, 3, 4, 5 & 6), [the Applicant] agrees to FRV [the Agency] only releasing email 6, so long as within that emails 5-1 are contained below AND that any attachments that were sent with emails 5 – 1 are included.

6. Section 21(2)(a) provides that an Agency may extend the time to make a decision by not more than 15 days if consultation is required under section 29, 29A, 31, 31A, 33, 34 or 35. On [date], the Agency notified the Applicant of its decision to extend the time taken to make the decision by 15 days in accordance with section 21(2)(a).
7. On [date], the Agency made the decision to refuse to process the request under section 25A(1) on the basis that the work involved in doing so would substantially and unreasonably divert the Agency's resources from its other operations.

### **Review application**

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. 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 of exemptions**

#### ***Section 25(A)(1) - Refusal of a request in accordance with section 25A(1)***

13. 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).
14. 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 collecting 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 consultation 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.

...

15. Section 25A(6) provides:

(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) give the Applicant a reasonable opportunity 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.

16. The Victorian Supreme Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*<sup>1</sup>, 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...

17. 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.<sup>2</sup>

18. 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, that processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.<sup>3</sup>

### **Consultation under section 25A(6)**

19. In their review application, the Applicant states:

FRV's use of section 25A(1)(a) to refuse to even look into the request is very, very disappointing. The background to my request – significant spending on a very minor and, in some views, unnecessary change in the uniforms of senior FRV personnel – indicates there is significant public interest in the information being released. For FRV to refuse to even attempt to look for documents is in gross opposition to the intention and purposes of the Act.

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<sup>1</sup> [2001] VSCA 246 at [48].

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

<sup>3</sup> *Ibid* at [11].

FRV's statement that my [date] revision "included additional documents to the scope, requiring further work to be performed" is simply not true. In the 'invitation to narrow the request section' of attachment 1, I addressed each of their points as follows:

1. I removed three of the five original key words, which substantially narrowed the scope of request;
2. I agreed fully to FRV's suggestion of the require the key words to appear in the subject line AND/OR the body of the email, as opposed to the original requirement that they appear in both. This also substantially narrowed the scope of request;
3. I narrowed the request by 7 months; AGAIN, substantially narrowing the scope of the request;
4. I agreed to remove a substantial amount of information from the scope of the request, removing the need for FRV to consult with third parties prior to releasing the information to me; and
5. I agreed fully to FRV's request that only unique emails at the end of a chain were sought, rather than all duplicate email chains.

20. In relation to the consultation requirements under section 25A(6), the Agency submits:

The process engaged in by FRV met the obligations set out in s 25A(6) of the FOI Act, noting that there is no obligation for "specific guidance" to be offered. Instead the obligation is as far as is reasonably practicable, to provide the applicant with any information that would assist. FRV contends that it provided the applicant with information that it believed would assist where that information was available and to the extent that FRV could do so without actually processing the request.

In support of this contention, FRV refer to the reasonable steps undertaken including two sets of preliminary searches, prior to and following receipt of the applicant's response to the s 25A(6) notice.

When the request was initially made, FRV conducted preliminary searches to obtain a view on whether it would need to seek a deposit and the time and number of documents involved in processing the request. Upon obtaining initial views of the FRV staff who would perform the searches, FRV formed the view that the request in its original form would be problematic to process based on the time required and the impact on FRV staff. These preliminary searches led to the s 25A(6) notice issued to the applicant.

Following receipt of the amended request, FRV undertook further searches for the documents in good faith, believing that it would be able to process the request based upon the amendments made. To reinforce this point, the suggestions in the s 25A(6) notice were believed to be sufficient to narrow the request suitably so that it could be processed. FRV made these suggestions without completing the searches or processing the documents. FRV had been unable to identify that the suggestions would be insufficient from the information it had previously gathered and it could not have done so without engaging in the very task that s 25A(1) is designed not to require.

There are numerous cases where the application (or not) of s 25A(1) has been provided based on estimates alone and without identifying any documents. They range from very early decisions (eg *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496; *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178) through to more recent decisions (eg *The Age Company Pty Ltd v Cenitex* [2012] VCAT 1523, [56]). It has been accepted that there will "frequently be a speculative aspect to an agency's assessment of resources and the impact processing will have on it, which is satisfactory provided the estimates are reasonable and not exaggerated (*The Age Company Pty Ltd v Cenitex* [2012] VCAT 1523, [56]). Neither the FOI Act nor the cases on s 25A(1) establish a requirement for specificity, for instance:

"[it is] not required ...to embark upon any detailed forensic exercise to establish with precision the exact size of the document pool encompassed by the request. It is enough (in the context of such a wide request) that their familiarity with the pool of records enables them to have a real appreciation of the magnitude of the document pool and a real appreciation of the resource implications" (*Wright v State Electricity Commission* (Unreported, VCAT, 29 July 1998) p 16 per Senior Member Megay).  
"Further, suggestions that the respondent had a duty to evaluate with precision the number of

documents encompassed by the request would defeat the purpose of section 25A(1)” (Wright v State Electricity Commission (Unreported, VCAT, 29 July 1998) p 17 per Senior Member Megay).

The notice provided to the applicant in relation to the Request provided, as far as was reasonably practicable, sufficient information to help the applicant understand why the request was too broad and to assist the applicant to amend or affirm the request. That notice also made suggestions as to how the request might be amended but also invited the applicant to consult with FRV so as to further narrow the scope of the request. Providing greater specificity would not have been possible without reformulating the request to a form that did not address the types of documents actually sought by the applicant. It should be recognised here that the applicant did not identify with particular specificity the document [they] sought, but referred to a broad ranging type of document (email) and certain keywords. Unfortunately, the key words selected are commonly used in email correspondence.

The language in s 25A(6) seeks to achieve the purpose of the agency assisting an applicant to modify a request in order to overcome the agency’s objection to processing the request. (Professional Standard 5.2(a). This is a requirement expressly stated to be in addition to the requirements of s 25A(6). Therefore, non-compliance with the Professional Standard does not affect the validity of the s 25A(6) notice). That does not, however extend to a positive duty to assist the applicant to re-formulate the request. Any reformulation or amendment is a matter for the applicant to do having received the information provided by the agency in the s 25A(6) notice. The “positive obligation” on an agency is “to assist the applicant in providing information” as far as reasonably practicable. (Chopra v Department of Education and Training [2019] VSCA 298, [112].) This has occurred.

Therefore, FRV contends that it has satisfied the requirements of s 25A(6)(c) of the FOI Act in these particular circumstances.

*Did the Agency meet the requirements of section 25A(6)?*

21. I am satisfied the Agency met the requirements of section 25A(6)(a) in that the Applicant was given written notice of the Agency’s intention to refuse to process the request, and that an officer was identified with which the Applicant could consult.
22. However, I am not satisfied the Agency provided the Applicant with a reasonable opportunity to consult as required under section 25A(6)(b), for the following reasons:
  - (a) the Applicant agreed to each part of the Agency’s suggestions for removing the grounds for refusing to process the request by substantially narrowing their request;
  - (b) if, in agreeing to narrow the scope in the way in which the Agency suggested was insufficient, then the advice provided to the Applicant was incorrect or inadequate;
  - (c) in such circumstances, I consider a ‘reasonable opportunity to consult’ would have included a further attempt by the Agency to describe why the work involved in processing the narrowed scope, that had been made in accordance with the Agency’s advice, would substantially and unreasonably divert its resources from its other operations and provide the opportunity for the Applicant to respond;
  - (d) I disagree with the Agency that it does not have to provide any ‘specific guidance’ to applicants in its consultation letter under section 25A(6). Rather, for consultation to be meaningful and constructive, the Agency must provide information to the Applicant that actually assists them to remove the grounds for refusal; and
  - (e) while the agency is not required to conduct searches and calculate with precision the time it would take to process a request, it is required to provide reasonable estimates such that the Agency and the Applicant can negotiate the scope of a request so as to assist an Applicant make the request for the documents they seek. If those estimates require revision following the

narrowing of the scope of a request, then I consider the Agency has an obligation to undertake and communicate such revisions.

23. As I have determined the Agency did not provide the Applicant with a reasonable opportunity to consult, it has not met the requirements of section 25A(6) and therefore the requirements of section 25A(1) have not been satisfied.

### **Conclusion**

24. On the information before me, I am not satisfied the requirements for refusal to grant access to documents in accordance with section 25A(1) are met on grounds the Agency did not consult with the Applicant in accordance with the mandatory consultation requirements under section 25A(6).

25. Accordingly, the Agency is required to process the Applicant's request in accordance with the FOI Act.

### **Review rights**

26. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (VCAT) for it to be reviewed.<sup>4</sup>

27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>

28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>6</sup>

29. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.

30. 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.<sup>7</sup>

### **When this decision takes effect**

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

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<sup>4</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>5</sup> Section 52(5).

<sup>6</sup> Section 52(9).

<sup>7</sup> Sections 50(3F) and (3FA).