

Notice of Decision and Reasons for Decision

Applicant:	'EA9'
Agency:	Hepburn Shire Council
Decision date:	12 January 2022
Provision considered:	Section 25A(1)
Citation:	'EA9' and Hepburn Shire Council (Freedom of Information) [2022] VICmr 36 (12 January 2022)

FREEDOM OF INFORMATION – council documents – planning permit application – substantial and unreasonable diversion of agency resources from other operations – refusal to process an FOI request

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 is the same as the Agency's decision.

I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

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 Applicant's request.

Joanne Kummrow
Public Access Deputy Commissioner

12 January 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the initial terms of their request to the following documents:

Point 1

- correspondence between Council staff/council representatives and the [another Victorian government agency] concerning Planning Permit Application no. [number] dated up to and including [date]
- file notes of telephone conversations and records of telephone conversations between Council staff/council representatives and the [another Victorian government agency] and Planning Permit Application no. [number] dated up to and including [date]
- correspondence between Council staff/council representatives and the [Minister] concerning Planning Permit Application no. [number] dated up to and including [date]
- file notes of telephone conversations and records of telephone conversations between Council staff/council representatives and the [Minister] concerning Planning Permit Application no. [number] dated up to and including [date]

Point 2

- correspondence between Council staff/council representatives and the [another Victorian government agency] concerning Planning Permit Application no. [number] dated up to and including [date]
- file notes of telephone conversations and records of telephone conversations between Council staff/council representatives and the [another Victorian government agency] concerning Planning Permit Application no. [number] dated up to and including [date]

Point 3

- correspondence between Council staff/council representatives and Objectors to Planning Permit Application no. [number] dated up to and including [date]
- file notes of telephone conversations and records of telephone conversations between Council staff/council representatives and Objectors to Planning Permit Application no. [number] dated up to and including [date]

Point 4

- documents produced by Council planning officers for Councillor consideration in relation to Planning Permit Application no. [number] dated on or before [date]
- emails between Councillors, council planning officers and council staff/council representatives in relation to Planning Permit Application no. [number] dated on or before [date]
- meeting notes, file notes and Minutes of Councillor meetings and briefing sessions in relation to Planning Permit Application no. [number] dated on or before [date]

Point 5

- file notes and memoranda prepared by Councillors, council planning officers and council staff/council representatives concerning Planning Permit Application no. [number] dated on or before [date]
- documents produced by Councillors, council planning officers and council staff/council representatives regarding alternative motions for Planning Permit Application no. [number] dated on or before [date]

3. 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 the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
4. The Agency's letter invited the Applicant to consult with the Agency with a view to removing the proposed ground for refusal by refining the scope of the request.
5. The Applicant responded to the Agency's invitation to consult and attempted to narrow the terms of their request. However, the two parties were unable to reach an agreement on the narrowed terms.
6. 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 Applicant's request under section 25A(1) as it was satisfied the work involved in processing the request would substantially and unreasonably divert resources from its other operations. The Agency's decision letter sets out the reasons for its decision.

Review application

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

Refusal of request under section 25A(1)

12. 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) with a view to rescoping the terms of the request so as to remove the proposed ground for refusal.
13. 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
 - (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... 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.
- ...

14. In *Secretary, Department of Treasury and Finance v Kelly*,¹ the Victorian 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 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...

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

16. The words 'other operations' in section 25A(1) includes an agency's ability to deal with and process other FOI requests it receives, where its ability to do so would be impaired by dealing with and processing an FOI request due to its size and scope.²

¹ [2001] VSCA 246 at [48].

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

17. Once an agency refuses an FOI request under section 25A(1), it bears the onus of establishing it has met the requirements of this provision.³
18. 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 requirements under section 25A(6)

19. Before refusing an FOI request under section 25A(1), an agency must first notify the applicant of its intention to refuse the request, 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 in amending the terms and scope of their request so to remove the proposed ground for refusal.⁵
20. As stated above, the Agency notified the Applicant of its intention to refuse the request and nominated an Agency officer with whom the Applicant could consult with a view to making the request in a form that would remove the proposed grounds for refusal. The Agency's correspondence provides suggestions for narrowing the scope of the request including the removal of specific categories of documents.
21. The Applicant attempted to narrow the terms of the request by:
 - excluding documents which have already been provided to them as part of the planning permit application process; and
 - excluding documents sent between our clients and Council
22. However, the Agency did not consider these changes to the terms of the request to be sufficient to remove the grounds for refusal under section 25A(1). Accordingly, the Agency sent a letter to the Applicant dated [date] notifying of its decision to refuse to process the request.
23. I am satisfied the Applicant and Agency each showed a willingness to reach agreement on rescoping the terms of the request to enable it to be processed. However, they were unable to reach agreement as to refining the scope of the request.
24. As no agreement was reached, 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.⁶

Section 25A(1) requirements to be met

25. Firstly, I must determine whether the work involved in the Agency processing the Applicant's request would involve a substantial diversion of the Agency's resources from its other operations.
26. Secondly, I must determine the work involved in the Agency processing the Applicant's request would involve an unreasonable diversion of the Agency's resources from its other operations.

³ *McIntosh v Victoria Police (General)* [2008] VCAT 916 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].

⁶ Sections 49(F) and 49(P); *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246.

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

27. When determining whether to refuse a request under section 25A(1), an agency need only estimate how much time and effort would be spent in refusing an FOI request. To require that the issue be determined with absolute certainty would compel the agency to undertake the very work that section 25A(1) is designed to avert.⁷
28. In its consultation with the Applicant, its decision letter and its submissions to OVIC, the Agency provided details regarding document searches conducted, the estimated time and effort required to identify all documents relevant to the terms of the Applicant's request and the Agency's available resources and workload.
29. The Agency's submissions are summarised below:
 - (a) The Agency does not have a dedicated FOI officer. Rather, a small number of Agency officers deal with FOI requests in addition to their other responsibilities.
 - (b) The Agency has already spent a total of 21 days and [monetary amount] in responding to the Applicant's request, including searching for the relevant documents. The cost to the Agency to complete processing the request would be significant.
 - (c) Although the Applicant narrowed the scope of the request, there is still over 220 documents totalling 3,782 pages to assess. It would take the relevant Agency officer 125 hours to assess each page to determine whether exemptions apply. Consultation would also be required with other Agency officers who have subject matter knowledge over the documents.
 - (d) The Agency officer, responsible for dealing with FOI requests is able to dedicate four to five hours per week to processing FOI requests. Based on the Agency's workload and availability, it would take over 25 weeks to examine the documents and make a final decision.
 - (e) At the time of notification, the Agency was dealing with 15 FOI requests. The Agency usually processes five requests per year.
 - (f) The Agency, being a small regional council, does not have a designated 'FOI officer' or 'FOI team'. The Agency has faced staff shortages over this period, including as a result of the COVID-19 pandemic.
30. I accept the Agency's current work arrangements and resources, due to the COVID-19 pandemic, will be impacting the Agency's ability to process FOI requests, including in relation to a large request of this nature.
31. On the information before me and having carefully considered the terms of the Applicant's amended request, I am satisfied the time required for the Agency to assess and undertake any required consultation regarding the identified documents in accordance with the FOI Act, would involve a substantial diversion of the Agency's resources from its other operations.

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

32. 'Unreasonableness' was considered in *Re SRB and Department of Health, Housing, Local Government and Community Services*, where the Commonwealth Administrative Appeals Tribunal held:

⁷ *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.⁸

33. 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*,⁹ in which the Victorian Civil and Administrative Tribunal (**VCAT**) considered relevant factors when determining if a request involves 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 a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort

I am satisfied the terms of the request and the nature of the documents sought were sufficiently precise to enable the Agency to locate the requested documents. However, this does not consider the time and resources that would be required to examine and consult upon those documents.

- (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'.¹⁰

However, in *Mildenhall v Department of Education*,¹¹ VCAT held:

Section 25A seeks to balance competing interests. There is a public interest in an agency not being diverted from its core work through needing to process a very broad-ranging request for documents.

I accept the Applicant's interest in seeking access to the documents that relate to their ongoing planning permit application.

However, given the nature of the request and the amount of time and effort that would be required to process the documents, I am of the view that the public interest in the Agency not being diverted from its core operations, outweighs the competing interests of the Applicant. This includes the need for the Agency to balance the competing demands of other FOI requests it currently has on hand.

- (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

I accept the Agency's working arrangements have been impacted by COVID-19 and this has reduced its capacity and speed in the processing of FOI requests.

Given the amount of time already dedicated to this request and the estimates provided by the Agency for processing, I am satisfied the request is not a reasonably manageable one. This

⁸ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

⁹ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

¹⁰ Section 3(1).

¹¹ (unreported, VCAT, 19 April 1999) at [30].

takes into account the current FOI workload, the adapted working arrangements in response to COVID-19 and resources available for dealing with FOI applications.

(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

Having reviewed copies of correspondence exchanged between the Applicant and the Agency in relation to this request, I consider the Agency could have notified the Applicant of their intention to refuse the request in a timelier fashion.

However, I acknowledge the Agency provided the Applicant with a reasonable opportunity to revise their request, discussing the matter with them, and providing suggestions to assist them in narrowing the scope of the request.

Based on the correspondence, I consider the Applicant took a cooperative approach to consulting with the Agency and narrowing the terms of their request. However, the parties were unable to reach an agreement as to the narrowed terms.

(e) The statutory time limit for making a decision

Based on a reduced estimate for the work required to process the request, the number of FOI requests the Agency has on hand, and the resources available to the Agency to process FOI requests, I consider 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 time required for the Agency to examine the documents and consult with any person or body in relation to the request, based on its size means that, even with an extension of time granted, the Agency would not be able to process the request within a reasonable time.

34. Having considered the above factors, I am satisfied processing the Applicant's request, in its current form, would involve an unreasonable diversion of the Agency's resources from its other operations.

Conclusion

35. On the information before me, I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
36. Accordingly, I am satisfied the requirements for refusal to grant access to the documents 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.
37. Despite my decision, it is open to the Applicant to make a new FOI request to the Agency. In doing so, I encourage the Applicant to consider the terms of their request and, if necessary, consult with the Agency with a view to scoping the terms of their request so that can be processed by the Agency.

Review rights

38. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹²

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
40. 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.
41. 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.¹⁴

¹³ Section 52(5).

¹⁴ Sections 50(3F) and (3FA).