

Notice of Decision and Reasons for Decision

Applicant:	'EB7'
Agency:	Bendigo Health Care Group
Decision date:	17 June 2022
Provision considered:	Section 25A(1)
Citation:	'EB7' and Bendigo Health Care Group (Freedom of Information) [2022] VICmr 42 (17 June 2022)

FREEDOM OF INFORMATION – medical file – substantial and unreasonable diversion of agency resources from other operations – mental health records – consultation requirements under section 25A(6) – [Professional Standard 9] – [varied decision]

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
17 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to their medical file.
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 the documents sought under section 25A(1), on the 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 their request. The Applicant declined to do so.
4. On [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). The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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, OVIC staff invited the Applicant to consider refining the terms of their request. The Applicant did not respond to this invitation.
8. Having received no response from the Applicant, OVIC staff followed up with the Applicant regarding the invitation to reconsider refining the FOI request. The Applicant did not respond to this further invitation.
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.

Review

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

12. 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).

13. 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; or
 - ...
- (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.

14. The Victorian Supreme Court of Appeal has 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... ¹

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

¹ *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [48].

16. The meaning of 'other operations' 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
17. 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. Namely, processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.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. In accordance with section 25A(6), an agency must notify an applicant of its intention to refuse their 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.⁵
20. In other words, if an agency refuses to process an FOI request under section 25A(1), it may do so only after the consultation requirements under section 25A(6) are met. Therefore, compliance by an agency with the requirement under section 25A(6) is a pre-condition to the application of section 25A(1).
21. 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. As stated above, the Applicant did not respond to the Agency's invitation to consult to remove the grounds for refusing to process the request.

Review of the application of section 25A(1)

22. 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?

23. When determining whether to refuse a request, it is only possible for an Agency to estimate how much time and effort would be spent to refuse the 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.⁶
24. In its consultation letter and decision letter, the Agency provided details regarding the quantity of documents relevant to the request and the time and staff resources required to process the request, as summarised below:

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].

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

- (a) The Agency estimates there are approximately 1,040 pages of documents matching the terms of the Applicant's request;
- (b) The documents exist in various formats and databases. They are also stored in a significant number of files which need to be sorted to enable the Agency to locate, copy and collate the requested documents;
- (c) It is estimated that on average 100 pages of a health record can be reviewed, copied/printed and collated per hour (if consulting and exemptions are required a greater time frame may be required);
- (d) The average number of pages that the Agency processes per request is 200 pages and this request is over five times larger than the average request;
- (e) The Agency estimates it would take over 10 hours to process the request, without including third party consultation and assessing exemptions and this would be to the detriment of completing other tasks; and
- (f) It is apparent from the nature of the documents that many documents would require the Agency to conduct consultations with individuals to obtain their views about the disclosure of their information.

25. The Agency made the following submission to OVIC on 6 June 2022:

Our staff levels in the FOI office currently are:

- 1 EFT FOI Officer
- .5 EFT FOI Officer
- .3 EFT FOI Officer

We are currently working below allocated staffing for this division [further background redacted]...

As with many workforces, these staffing levels are also affected by use of unexpected personal leave due to COVID & influenza & other illness

There are 85 requests currently active at various stages of the process

New requests received

- April – 55
- May – 31

In May 2022, 38 decisions were made – 26 of these were overdue with an average of 46 days to be finalised.

As per the [Agency's] submission dated 10/03/2022, the ability to finalise large requests remains unreasonable and would be detrimental and unfair to processing multiple other requests.

26. The Agency made the following submission to OVIC on 10 March 2022:

... Freedom of Information officers, at Bendigo Health, are responsible for processing and collating the information required for other release of information tasks such as requests from the Coroners Court, Subpoenas, Witness Summons, Police requests as well as those from the Department of Families, Fairness & Housing, in relation to child protection. Depending on the urgency of these additional requests, they can often take precedence and utilize significant periods of time, to collate and provide the required information and they can affect the time available for FOI requests.

The applicant's record is predominantly Mental Health Services therefore the record is for review by the FOI officer who works [part time] and attends to other duties mentioned above and who is also currently assisting with junior staff.

From previous experience, records with Mental Health files often take longer to review due to the potential increase of sensitive information and have further possibilities for more exemptions. This is due to the nature of which information is acquired and therefore consultation becomes required adding further time for completion.

If third party consultation was required it could necessitate staff clinically involved with the applicant, to examine the required documents and consider anticipated exemptions. As proven, with the previous requests, this can be a very time consuming task as it can be difficult to get in contact with staff who are shift workers and to that can take clinical staff away from their normal duties, which impacts their work load or personal time.

During COVID 19 conditions, the mental health service requirements have already been substantially impacted, and to remove the staff away from their duties, to clinically care for the public, would place further distress on staffing workloads and the services. This is also considered to be unreasonable diversion of the services resources.

27. I have considered the Agency's submissions regarding the practicability and its capability to process the request. I acknowledge the impact COVID-19 has had on the Agency's mental health service and that processing the Applicant's request may divert the Agency's resources from its other important health care operations, particularly if consultation with Agency officers and other third parties is required. However, I also note the Agency has legal obligations under the FOI Act and these obligations do not fall away nor become less important when Agency FOI officers are responsible for other roles within the Agency.
28. In this regard, the FOI Professional Standards require an agency's principal to ensure their agency is properly resourced so it can meet its statutory obligations under the FOI Act. Specifically, Professional Standard 9 provides:

Resources, training and awareness

Statement

An agency must administer the Act with a view to making the maximum amount of government information available to the public promptly and inexpensively – section 16(1) of the Act. This requires a principal officer to ensure their agency and its officers have the resources and training to administer the Act.

Professional Standards

- 9.1 A principal officer must ensure their agency has the necessary resources and procedures in place to be able to meet their agency's statutory obligations under the Act, including:
- (a) being sufficiently resourced to receive and process requests, as and when required, within the required statutory time;
 - (b) the necessary software or systems to enable officers to process requests;
 - (c) internal policies to enable officers to carry out their functions across the agency; and
 - (d) anything else reasonably necessary for the agency to carry out its statutory obligations in an effective and efficient manner.

29. On the information before me, I am satisfied the time required for the Agency to process this request would involve a substantial diversion of the Agency's resources.
30. Accordingly, I am satisfied the first requirement for section 25A(1) is met.

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

31. 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:

...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

32. 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 am satisfied the terms of the request 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 in order to protect 'essential public interests and the private and business affairs of persons in respect of whom information is collected and held'.⁹

In *Mildenhall v Department of Education*,¹⁰ VCAT held:

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

I acknowledge the Applicant's personal interest in seeking access to their medical file.

However, in the current circumstances, I am not satisfied the Applicant's interest in seeking access to the document outweighs the competing public interest in the Agency not being diverted from its core health care operations in order to process an FOI request of this size. This includes the need for the Agency to balance competing demands in relation to its functions and other operational responsibilities. I consider these factors are somewhat compounded by the impact COVID-19 has had (and continues to have) on the Agency's mental health service and its workload.

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).

¹⁰ (unreported, VCAT, 19 April 1999) at [30].

- (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

While I acknowledge the Agency's resources available for dealing with FOI applications, I do not consider it is unreasonable for the Agency to process the request in the circumstances for the following reasons:

- (a) The documents are the Applicant's medical records, and the majority of that type of information is routinely released under FOI to patients.
- (b) An estimate of 10 hours is not a significant amount of time to process an FOI request.
- (c) Whilst the Agency has an obligation under FOI to consult with third parties regarding the disclosure of their information, the third party's response whether to release their information is not a determinative factor. Further, the FOI Act provides that consultation is required only where it is practicable to do so. While the FOI Act does not provide a definition of 'practicable', an agency should apply common sense considerations when determining if third party consultation is practicable. In this case, this may include consideration as to whether the Agency has the resources to conduct consultation of all persons or certain persons named in the documents.
- (d) At the time of my review, as stated above, the Agency is processing 85 FOI requests which are at various stages of the request process.

While I acknowledge the resources available to the Agency for dealing with FOI requests and other responsibilities of the Agency's FOI team as set out in its submissions, I do not consider the time required for the Agency to process the requested documents would be unreasonable in the circumstances.

Therefore, 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 co-operative approach to redrawing the boundaries of the application

The intention of the consultation requirement under section 25A(6) is to provide for a reasonable exchange of information and negotiation between an agency and an applicant in relation the terms and scope of the applicant's request.

Having reviewed correspondence between the Applicant and the Agency, I am satisfied the Agency provided options for the Applicant to narrow the scope of their request.

While the Applicant is not obliged to do so, the Applicant did not respond to the Agency's invitation to consult to further narrow the scope of their request.

- (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.

33. Having considered the above factors, I am not satisfied the diversion of the Agency's resources would be unreasonable in this matter.
34. Accordingly, I am not satisfied the second requirement for section 25A(1) is met.

Conclusion

35. On the information before me, I am not satisfied the work involved in the Agency processing the Applicant's request would both substantially and unreasonably divert the resources of the Agency from its other operations.
36. 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 in its current form.

Review rights

37. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
39. The Agency may apply to VCAT for a review up to 14 days from the date it is 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

When this decision takes effect

42. My decision does not take effect until the Agency's 14 day review period expires.
43. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and 50(3FA).