

Notice of Decision and Reasons for Decision

Applicant:	'DR8'
Agency:	VicForests
Decision date:	29 September 2021
Provision considered:	Section 25A(1)
Citation:	'DR8' and VicForests (Freedom of Information) [2021] VICmr 288 (29 September 2021)

FREEDOM OF INFORMATION – all documents concerning applicant – correspondence – substantial and unreasonable diversion of agency resources from its other operations – consultation requirements under section 25A(6)

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 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 Applicant's 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

29 September 2021

Reasons for Decision

Background to review

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

...any investigative documents including notes, reports, documents, texts that involve [description of activity]. Any internal correspondence and briefings that discuss [Applicant] by name and any document in relation to the [Third party] that include [the Applicant's] name from [date range].
 2. Following consultation with the Agency, the Applicant clarified the terms of their request.
 3. The clarified request seeks access to the following documents:
 1. All documents from [date] that refer to the [Applicant] and which relate to [description of activity];
 2. All correspondence from [named person] between [date range] that refers to my name;
 3. All correspondence from [named person] between [date range] that refers to my name;
 4. All correspondence between [Agency] and [named person] between [date] and [date] where communications relate to me, including my role as [third party]; and
 5. All documents from [date] that refers to my name as a member of the [third party] which were sent to [third parties] by one or more of the following [named persons/third parties].
 4. On [date], the Agency notified the Applicant in accordance with section 25A(6) of its intention to refuse the Applicant's request under section 25A(1) on grounds processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Applicant was invited by the Agency to consult with an Agency officer with a view to narrowing the terms of the request and removing the proposed grounds for refusal.
 5. On [date], the Applicant responded to the Agency, and refined the scope of their request to the following categories of documents (**amended request**):
 1. All documents from [date range] that refer to [the Applicant's] name and which relate to [description of activity];
 2. All correspondence from [named person] between [date range] that refers to [the Applicant's] name;
 3. All correspondence between [Agency] and [named person] between [date range] where the communication relates to [Applicant]; and
 4. All documents from [date range] that refer to [the Applicant's] name and/or refer to [their role description] which were sent to [Agency] management and/or [Agency] board by one or more of the following [named persons/third parties].
 6. I note the Agency's adoption of the numbering from the amended request, that the Applicant refined the scope incorporating the following changes:
 1. No change;
 2. No change;
 3. Removed;
 4. Time period changed; and
 5. Time period changed.
 7. By email [dated], the Agency advised the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1). Its reasons included:
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Despite your attempt to remove this ground for refusal by narrowing the scope of your Amended Request, the timeframes sought and the range of documents requested remain excessively broad. Therefore, significant work would still be involved were the Further Amended Request to be processed.

Review application

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the Applicant's amended request.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. During the review, OVIC staff consulted with the Applicant and invited them to consider whether they would like to narrow the terms of their request. The Applicant advised they wished to continue with the review based on their original request terms.
11. I have considered all communications and submissions received from the parties.
12. 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.
13. 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 application of section 25A(1)

14. Section 25A(1) provides an FOI request may be refused in certain circumstances following an agency consulting with an applicant under section 25(6).
15. 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.

16. 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

- 17. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and are to be given their ordinary meaning.
- 18. The meaning of '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
- 19. Once an agency determines to refuse an FOI request under section 25A(1), it bears the onus of establishing it has met the requirements of this provision.³
- 20. On review, I must consider whether, at the time of my decision, the requirements of section 25A(1) are satisfied. Namely, whether processing the Applicant's request would substantially and unreasonably divert the Agency's resources from its other operations.⁴

Agency consultation requirements under section 25A(6)

21. In accordance with section 25A(6), an agency must notify an applicant of its intention to refuse an FOI request and nominate an agency officer with whom the applicant can consult, provide a reasonable

¹ *Secretary, Department of Treasury and Finance v Kelly* [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 and Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

opportunity for the applicant to consult with the agency, and provide information to assist the applicant to amend the terms of their request with a view to removing the proposed ground for refusal.⁵

22. As stated above, before refusing the Applicant's request, 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 provided suggestions for narrowing the scope of the request. The Agency also advised the Applicant that searches for documents relevant to the request would require searches of two separate email databases, one of which is no longer in use by the Agency. Further, the Agency advised certain documents relevant to the Applicant's request were held in paper archives and, due to the workplace restrictions in place from the COVID-19 pandemic, the Agency is currently unable to identify these hard copy documents.
23. On [date], the Applicant responded and refined the scope of their request to the amended request, as set out in paragraphs 5 and 6 above.
24. On the information before me, I am satisfied the Agency complied with its obligations to consult with the Applicant under section 25A(6) before refusing the Applicant's request.

Review of application of section 25A(1)

25. In determining whether section 25A(1) applies, firstly I am required to consider whether processing the Applicant's request would involve a substantial diversion of the Agency's resources, and secondly, whether processing the request would involve an unreasonable diversion of the Agency's resources.

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

26. In estimating the resources involved in an agency determining 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.

27. In its consultation with the Applicant, and decision letter and submission to OVIC, the Agency provided details regarding initial searches it conducted, the estimated time and effort required to identify documents relevant to the terms of the Applicant's request and the Agency's available resources and workload. The Agency's submission is summarised below:
 - (a) The Agency has no dedicated FOI Unit. FOI duties and responsibilities are conducted by its legal department, which comprises a four person legal team, with two officers (one full-time and one part-time) trained to process FOI requests.
 - (b) At the time of the request, the Agency was processing 23 FOI requests and 16 FOI consultation requests from other agencies. In addition to FOI requests, the Agency had nine separate public interest litigation matters and one matter before VCAT.
 - (c) The Agency undertook a preliminary search for documents, through two email applications, using keyword searches to estimate the number of documents that would fall within the request. The Agency submits searches would need to be conducted through computer drives and paper form,

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

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

both of which contain large volumes of documents, to ascertain whether they contain any relevant documents. Further, hard copy documents would require manual document searches.

- (d) Based on the Agency's current workload and given the timeframes for the amended request, it estimates the request would take Agency officers, excluding all other duties, 28 weeks to retrieve relevant documents for processing.
- (e) I accept the Agency's current adapted working arrangements due to COVID-19 will be impacting the Agency's ability to process FOI requests, particularly where the requested documents are in hard copy. However, I also note the Agency has legal obligations under the FOI Act and these obligations do not disappear or become less important during current remote working arrangements.
- (f) To process the Applicant's request in its entirety, further searches of other business areas within the Department would be required that would impact upon and divert those areas from their core functions and responsibilities.

28. 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 undertake a thorough and diligent search for all relevant documents, and then identify, assess and undertake any required consultation regarding those documents, 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?

29. 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

30. In determining unreasonableness for the purpose of section 25A(1), I have had regard to the approach adopted by VCAT in *The Age Company Pty Ltd v CenITex*,⁸ in which the Tribunal 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 a 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 request and the nature of the documents sought are sufficiently precise to enable the Agency to locate the requested documents. However, this does not take into account the time and resources that would be required to examine and consult upon those documents.

However, I accept the Agency's submission that, given the [large] date range for documents (back to date), searches would need to be conducted through computer drives and paper form to ascertain whether they contain any relevant documents and searches of hard copy documents would require manual searches.

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].

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 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 to whom information is collected and held'.⁹

In *Mildenall v Department of Education*, 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.¹⁰

Noting the subject matter of the request, I consider the Applicant has a strong personal interest in obtaining access to the documents. However, on the information before me, I am not satisfied there is a broader public interest that would be served by disclosure of the documents sought. Nor am I satisfied the Applicant's personal interest in the documents outweighs the public interest in the Agency not being diverted from its other operations due to the broad ranging nature and time frames of the request.

c. Whether the request is reasonably manageable

In summary, the Applicant seeks access to any correspondence and [description of] documents in relation to them held by the Agency for a [number] year period. Any relevant documents would likely be emails, letters and video [footage] which, I accept would be located, should any exist, in various formats.

I am satisfied the Agency provided sufficient information about the large number of documents estimated to fall within the terms of the Applicant's request, as well as its current FOI workload and resources.

Based on the information provided, I am satisfied the broad-ranging nature of the documents sought and [number] year timeframe would involve documents searches in a variety of Agency locations and formats to identify all relevant documents and the impact of this work on the Agency's resources would be unreasonable. This includes, but is not limited to, Agency officers in other business areas identifying relevant documents and the work involved in restoring back-up or archived documents not readily accessible.

Accordingly, I accept the Agency's estimate that searching for and processing any relevant documents, limited to email applications only, would take a substantial amount of time to complete. I further note, the Agency's estimate does not include time for Agency FOI officers to undertake additional searches with other Agency business units for relevant documents and to assess/consult on all information identified before making its decision.

Based on the Agency's time estimates, as well as a detailed summary of the resources available to the Agency, I am satisfied the work involved in processing the Applicant's request would significantly impact upon the ability of the FOI Unit to process other FOI requests, and divert other Agency officers from their other duties. As such, I am satisfied the request in its current form is not a reasonably manageable one.

⁹ Section 3(1).

¹⁰ Footnote for this case and quote.

- 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

Having reviewed copies of correspondence exchanged between the Applicant and the Agency in relation to this request, I am satisfied the Agency responded reasonably to the Applicant's request. This includes providing the Applicant with a reasonable opportunity to revise the terms of their request, discussing the matter with them, and providing suggestions to assist them in narrowing the scope of the request.

Based on correspondence between the Agency and the Applicant, I consider despite the Applicant not further narrowing the terms of their request, they took a cooperative approach to clarifying and consulting with the Agency.

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

Based on the likely time required for the Agency to process the Applicant's request and the Agency's current working arrangements due to COVID-19 pandemic, I am satisfied the Agency would not be able to process the request and make a decision within the statutory timeframe limit.

While I note section 21(2) provides for the Agency to seek the Applicant's agreement for an extension of time, I consider the Agency would be unlikely to be able to process the request within a reasonable timeframe even if an extension of time was granted.

31. 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

32. On the information before me, I am satisfied the work involved in processing the Applicant's request would involve both substantial and unreasonable diversion of the Agency's resources from its other operations.
33. Accordingly, I am satisfied the requirements under section 25A(1) are met and the Agency is not required to process the Applicant's request.
34. Despite my decision, it is open to the Applicant to consult with the Agency regarding framing a new FOI request in terms that the Agency is able to process within a reasonable period of time. In doing so, I encourage both the Agency and the Applicant to conduct any discussions and consultation with a continued spirit of cooperation in order that a balance can be struck between the Applicant's right to access documents that concern them and the work involved in the Agency processing the request.

Review rights

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

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

¹² Section 52(5).

37. 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.
38. 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.¹³

¹³ Sections 50(3F) and (3FA).