

Notice of Decision and Reasons for Decision

Applicant: 'EH3'
Agency: Victorian WorkCover Authority
Decision date: 7 February 2022
Provision considered: Section 25A(1)
Citation: 'EH3' and Victorian WorkCover Authority (Freedom of Information) [2022] VICmr 94 (7 February 2022)

FREEDOM OF INFORMATION – regulatory documents – employee injury – investigation file – investigation report – substantial and unreasonable diversion of agency resources from its other operations – third party consultation

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 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
7 February 2022

Reasons for Decision

Background to review

1. The Applicant through their legal representative made a request to the Agency seeking access to the following documents:

A full copy of the investigation report conducted in relation to our client's injury sustained... We request full disclosure of your file.

2. 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.
3. The Applicant was invited to consult with an Agency officer with a view to narrowing the terms of their FOI request to remove the proposed grounds for refusal. The Agency offered the following advice to assist the Applicant in narrowing the scope of their request:

Suggesting [Applicant representative] narrow the scope of the request to all entry reports and improvement notices included in the Brief of Evidence prepared by WorkSafe as part of its investigation into the [Applicant's] injury (being 35 documents).
4. On [date], the Applicant responded to the Agency, confirming they require a full copy of the Agency's investigation file.
5. Further consultation between the parties occurred over the telephone, during which Agency officers provided the Applicant's legal representative with options to narrow the scope of the request.
6. By email dated [date], the Agency provided the Applicant another opportunity to consult regarding the terms of their request.
7. As the Agency did not receive a response from the Applicant by [date], the Agency refused to grant access to documents in accordance with the Applicant's request under section 25A(1) on the basis the work involved in processing the request would substantially and unreasonably divert the Agency's resources from its other operations. The Agency's decision letter sets out the reasons for its decision.

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.

Scope of my review

13. During the review, OVIC staff provided the Applicant with an initial view that the requirements of section 25A(1) were likely to be met in this case. The Applicant was invited to narrow the scope of their request and/or to provide a further submission to support a contrary view.
14. In the Applicant's submission, the Applicant submitted:

We submit that the documents could be segmented and released incrementally over some weeks/months so that the administrative process does not burden Worksafe's resources unreasonably.
15. On [date], OVIC staff advised the Agency of the Applicant's willingness to consult further and their agreement for the Agency to process their FOI request over an extended period of time.
16. Following further discussions with OVIC staff, the Agency confirmed its decision remained to refuse to grant access to documents in accordance with the request under section 25A(1).
17. As no agreement was reached between the Agency and the Applicant as to narrowed terms for the Applicant's request, I am required to determine whether the requirements of section 25A(1) are met in relation to the terms of the Applicant's request, as set out in paragraph 1 above.

Review of application of section 25A(1)

18. 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).
19. Section 25A(1) 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 cause 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 relate, 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
 - (a) 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
 - (i) in consultation with any person or body in relation to the request; or
 - (b) in making a copy, or an edited copy, of the documents;
 - (c) or 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... 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.

- 20. Therefore, I must firstly ensure the Agency complied with its consultation obligations under section 25A(6).
- 21. Secondly, I must determine whether processing the Applicant's request would involve a substantial diversion of the Agency's resources.
- 22. Thirdly, I am required to determine whether processing the request would also involve unreasonable diversion of the Agency's resources.
- 23. 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
- 24. The words 'substantially' and 'unreasonably' are not defined in the FOI Act and are to be given their ordinary meaning.
- 25. 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
- 26. 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

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].

27. 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

Consultation requirements under section 25A(6)

28. 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 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
29. 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 provided suggestions for narrowing the scope of the request.
30. On [date], the Applicant advised the Agency by telephone that they require a full copy of all documents and did not agree to narrow the scope of their request. The Agency continued to invite the Applicant to consult to narrow the scope of the request to remove the grounds for refusal. However, the Agency received no further response from the Applicant.
31. 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 request.

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

32. 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.

33. During consultation with the Applicant and in its decision letter and submissions to OVIC, the Agency provided details regarding initial document searches it conducted, the estimated time and effort required to identify documents relevant to the terms of the Applicant's request and its available staff resources and FOI workload. The Agency's submissions are summarised below:
- (a) The Agency originally located [over 750] exhibits, in addition to witness statements. However, following further searches, additional briefs were located, totalling in excess of 10,300 pages relevant to the terms of the Applicant's request.
 - (b) While the time spent identifying, locating and collating the documents would not be significant, the Agency estimates it would take 115 business days to assess and redact 10,300 pages based on an estimate of five minutes per page. This estimate does not factor in consultation or time spent preparing any interim or final decision on the request.

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, *Tuitaali v Minister for Immigration and 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 [11].

- (c) Each year the Agency receives between 1200 and 1500 requests, meaning each FOI officer processes 30 to 40 requests at any given time.
- (d) If one FOI officer processes the Applicant's request on a full time basis, at best, the Applicant would have received the Agency's decision on [date] (without any consultation being undertaken). In doing so, the FOI officer's usual workload would have needed to be distributed between other FOI officers in addition to the 30 to 40 requests they were already processing.
- (e) Were the Agency's FOI officers to have processed their usual FOI workload, as well as the shared requests of another FOI officer, it would have been likely to result in delays in the Agency providing FOI decisions to other applicants which is inconsistent with sections 3(2) and 16(1) of the FOI Act, and 1.1 and 1.2 of the FOI Professional Standards.
- (f) Given the nature of the documents relevant to the Applicant's request, considerable internal consultation would be required.

34. On the information before me and having carefully considered the terms of the Applicant's 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?

35. 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

36. 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 and the nature of the documents sought are sufficiently precise to enable the Agency to locate the requested documents. However, this does not consider the time and resources 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 a government agency unless it is necessary to refuse access under an exception or exemption in the FOI Act to protect 'essential

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* [2013] VCAT 288 at [43]-[45].

public interests and the private and business affairs of persons in respect to whom information is collected and held'.⁹

In *Mildenhall 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 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 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

In summary, the Applicant seeks access to all documents in relation to an investigation regarding the Applicant. Any relevant documents are likely to be legal documentation in the form of briefs and witness statements.

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 the required steps to retrieve all relevant documents and its current FOI workload and available staff resources.

Based on the information provided, I am satisfied the quantity and nature of the documents sought is specific and would require few resources to locate all briefs in relation to the Applicant's investigation.

However, I accept the Agency's estimate that processing any relevant documents would take a substantial amount of time to complete. I further note, the Agency's estimate includes the time for an Agency FOI officer 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 Agency's 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.

- (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, I am satisfied the Agency responded reasonably to the Applicant's request and provided them

⁹ Section 3(1).

¹⁰ *Mildenhall v Department of Education* (unreported, VCAT, 19 April 1999) at [30].

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 the Applicant took a cooperative approach to clarifying and consulting with the Agency despite not agreeing to further narrow the terms of their request.

(e) The statutory time limit for making a decision

Based on the likely time required for the Agency to process the Applicant's request and the examination of [over 750] exhibits, totalling an estimated 10,300 pages, I am satisfied the Agency would not be able to process the request and make a decision within the statutory timeframe limit.

I note the Applicant's legal representative suggested the requested documents could be processed by the Agency in batches. While an agency and an applicant may reach an agreement to process a request over an agreed period of time, the FOI Act intends that an applicant must have timely access to the documents of an agency. Therefore, section 21 of the FOI Act prescribes a 30 day time limit for a decision with extensions of time available in certain circumstances. The Applicant's suggestion to break up their FOI requests into batches, while a pragmatic one, also needs to be considered in the context of an Agency's overall capacity to process a large request in its entirety and the availability of section 25A(1) in limited circumstances.

37. 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

38. On the information before me, I am satisfied the work involved in processing the Applicant's request would involve both a substantial and unreasonable diversion of the Agency's resources from its other operations.
39. Accordingly, I am satisfied the requirements under section 25A(1) are met and the Agency is not required to process the Applicant's request.
40. Despite my decision, it is open to the Applicant to further consult with the Agency regarding framing a new FOI request in terms the Agency is able to process within a reasonable period of time.
41. In doing so, I encourage 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 in accordance with the FOI Act.

Review rights

42. 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
43. 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).

44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
45. 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.
46. 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(9).

¹⁴ Sections 50(3F) and (3FA).