

## Notice of Decision and Reasons for Decision

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Applicant: 'FB8'  
Agency: Glen Eira City Council  
Decision date: 6 April 2023  
Provision considered: Section 25A(1)  
Citation: 'FB8' and Glen Eira City Council (Freedom of Information) [2023] VICmr 25 (6 April 2023)

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FREEDOM OF INFORMATION – council documents – substantial and unreasonable diversion of Agency resources – survey responses

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 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

6 April 2023

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## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - 1) The complete set of responses to the Have Your Say surveys on the draft Housing Strategy (second round of consultation) and the draft Caulfield Station Structure Plan
  - 2) All written submissions on the draft Housing Strategy and the draft Caulfield Station Structure Plan (identifying information to be redacted)
  - 3) All emails received by council and/or councillors pertaining to the draft Housing Strategy and the draft Caulfield Station Structure Plan (again identifying information redacted).
2. On [date], the Agency wrote to the Applicant seeking clarification under section 17(2) about the terms of Applicant's request, providing related documents that were publicly available.
3. The Applicant provided their response, clarifying the terms of their request.
4. On [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.
5. The Agency invited the Applicant to consult with an Agency officer in relation to rescoping the terms of the Applicant's request with a view to removing the proposed ground for refusal.
6. On [date], the Applicant responded to the Agency, narrowing the request to two categories of documents.
7. On [date], the Agency responded to the Applicant, inviting them to consult under section 25A(6) as it maintained the view processing the rescoped request would still substantially and unreasonably divert the resources of the Agency from its other operations.
8. On [date]the Applicant responded to the Agency, declining to further refine the scope of their request in line with the Agency's suggestion.
9. By letter on [date], the Agency advised the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1), as it was satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

### Review application

10. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
  11. The Agency was invited to make a written submission under section 49H(2) in relation to the review.
  12. I have considered all communications and submissions received from the parties, including the Applicant's response to the preliminary view provided.
  13. 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
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only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

14. I note Parliament's intention that the FOI Act 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 refusal under section 25A(1)**

15. 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 reducing the scope of the request and work involved in its processing.

16. 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.

...

17. In *Secretary, Department of Treasury and Finance v Kelly*,<sup>1</sup> the Victorian Supreme 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 unreasonably disruption to the day to day workings of the government through its agencies ...

18. The words 'substantially' and 'unreasonably' are not defined in the FOI Act and are to be given their ordinary meaning.
19. '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.<sup>2</sup>
20. 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.<sup>3</sup>

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

21. In accordance with section 25A(6), an agency must notify an applicant of its intention to refuse their 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 their request with a view to removing the proposed ground for refusal.<sup>4</sup>
22. The Agency sent a letter dated [date] to the Applicant notifying of its intention to refuse to process the request and nominating an Agency officer with whom the Applicant could consult with a view to making the request in a form that would remove the ground for refusal. In its letter, the Agency suggested the Applicant narrow the scope of their request by limiting its timeframe, limiting the request to specific responses to the strategy and excluding personal affairs information.
23. In response, the Applicant advised they did not seek access to personal affairs information and limited the timeframe.
24. The subsequent letter from the Agency to the Applicant advised that while the Applicant had narrowed the scope of the request, the work involved in processing the request would still unreasonably divert the Agency's resources from other operations. The Agency provided the Applicant with another invitation to consult to narrow the scope of the request, suggesting the

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

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

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

<sup>4</sup> *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

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Applicant narrow the scope of their request by again limiting the timeframe and limiting the request to specific responses to the strategy.

25. In their response, the Applicant declined to further narrow the terms of their request.
26. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access, provided a reasonable opportunity for the Applicant to consult with the Agency, and provided sufficient information to assist the Applicant in making their request in a form that would remove the proposed ground for refusal.
27. Firstly, I am required to determine whether processing the Applicant's request would involve a substantial diversion of the Agency's resources.
28. Secondly, I am required to determine whether processing the request would also involve an unreasonable diversion of the Agency's resources.

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

29. In estimating the resources involved in an agency deciding whether to refuse access under section 25A(1), the Victorian Civil and Administrative Tribunal (VCAT) has observed:<sup>5</sup>

...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.

30. 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. In the Agency's consultation letter with the Applicant of [date], the Agency noted:

... It would not be possible for me to complete the processing of this request within 30 calendar days, given our pre-existing and current workloads and work functions. Typically, I allocate a proportion of my available hours each week to meet Council's FOI obligations. Council usually receives in the vicinity of 50 FOI requests a year, and our resourcing is typically sufficient to meet our obligations under the Act.

In order to undertake the initial step of identifying, retrieving, collating, and copying the relevant documents, it is anticipated that it would take me between 6821 and 15,560 hours to process the emails at point 3 of your request alone. This is based on an estimate of 10 minutes per email.

I estimate based on 10 minutes per submission that to process the submissions on the Housing strategy would take 69 hours and to process the submissions on the Caulfield Major Activity Structure Plan would take approximately 24 hours.

I have not included any time required for the consultations referred to above. However anticipate it would take between 15 and 30 minutes per person that I would need to consult with. In my view, this is a conservative estimate and may not account for all the time that may be required when they contact me by email or telephone to discuss the documents in which their information appears or for me to explain how the exemptions in the Act may apply and what rights they may have in respect of the information they provided, or which relates to them or their organisation.

31. I note the Agency provided information concerning the impact of conducting consultation. I do not consider this to be a relevant factor.

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<sup>5</sup> *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

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32. Based on the narrowed scope of [date], the Agency advised the following:

In order to undertake the initial step of identifying, retrieving, collating, and copying the relevant documents, it was anticipated that it would take me 69 hours to process the 415 submissions. I estimate this based on 10 minutes per submission.

33. In its written submission, the Agency clarified:

The documents would be provided to the FOI Officer by relevant departments. [The] FOI officer would then have to review each document for relevance and redact any personal information (excluded from scope of request). Note there is expected to be a minimum of 415 individuals identified within the documents.

Without having access to the documents it is hard to estimate the total number of pages. Some submissions may go on for numerous pages where other submissions could be a paragraph or two.

69 hours is a conservative estimate of the time it would take to assess the relevant documents. This is based on 10 minutes per document and would include the work detailed above as well as considering any relevant FOI exemptions. 10 minutes per document is based on work undertaken on other requests that involve submissions (for example planning matters where the comments from objectors often have to be considered).

34. 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 responsive to each point of the Applicant's request, 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 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.<sup>6</sup>

36. 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*,<sup>7</sup> in which VCAT 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 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 Applicant's amended request are sufficiently precise to enable the Agency to locate the requested documents. However, I am satisfied the time required to undertake a search for and review each of the documents responsive to the Applicant's request would be unreasonable given the volume of documents to which the request relates.

- (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

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<sup>6</sup> *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

<sup>7</sup> *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

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interests and the private and business affairs of persons in respect to whom information is collected and held'.<sup>8</sup>

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.<sup>9</sup>

Noting the subject matter of the request, I acknowledge the Applicant's interest in obtaining access to the documents. However, on the information before me, I am not satisfied there is a public interest that would be served by disclosure of the requested documents being all specific responses provided by individuals and businesses. Nor am I satisfied the Applicant's interest in obtaining access to the documents outweighs the public interest in the Agency not being diverted from its other operations due to the large nature of the request and estimated time frames required to process it.

- (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 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. I accept the Agency's estimate that processing any relevant documents would take a substantial amount of time to complete.

I note the Agency advised that it currently has one staff member that processes FOI requests amongst their other duties.

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 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 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 and providing suggestions to assist them in narrowing the scope of the request.

While the Applicant agreed to narrow the scope of their request, they did not adopt nor take on board the Agency's suggestions to assist the Applicant in making their request in a form that could be reasonably processed by the Agency.

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

Based on the estimated time required for the Agency to process the Applicant's request, the Agency's current workload and the substantial volume of the request I am satisfied the Agency

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<sup>8</sup> Section 3(1).

<sup>9</sup> (unreported, VCAT, 19 April 1999) at [30].

would not be able to process the request and make a decision within the statutory timeframe limit.

While 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.

37. Having considered the above factors, I am satisfied processing the request would also involve an unreasonable diversion of the Agency's resources.
38. Accordingly, I am satisfied that each of the requirements for refusal to grant access to documents in accordance with the request under section 25A(1) are met.

### **Conclusion**

39. On the information before me, 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.
40. 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 request.
41. Despite my decision, it is open to the Applicant to consult with the Agency regarding a new FOI request in terms 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 and the work involved in the Agency processing the request.

### **Review rights**

42. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>10</sup>
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
44. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
45. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application to VCAT for a review of my decision is made.<sup>12</sup>
46. My decision does not take effect until the Applicant's relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>10</sup> Section 50(1)(b).

<sup>11</sup> Section 52(5).

<sup>12</sup> Sections 50(3F) and 50(3FA).

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