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Notice of Decision and Reasons for Decision

Applicant: 'FD4'
Agency: Department of Premier and Cabinet
Decision date: 10 May 2023
Provision considered: Sections 25A(1)
Citation: 'FD4' and Department of Premier and Cabinet (Freedom of Information) [2023] VICmr 39 (10 May 2023)

FREEDOM OF INFORMATION – financial records – office of the opposition – substantial and unreasonable diversion of Agency resources from its other operations

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.

Sven Bluemmel
Information Commissioner

10 May 2023

Reasons for Decision

Background to review

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

Financial records outlining salaries and expenses, and including any recorded invoices underpinning those records, pertaining to the office of the opposition, for the period [date] to [date]
2. 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.
3. The Agency's letter 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.
4. On [date], the Applicant responded to the Agency, declining to refine the scope of their request in line with the Agency's suggestion.
5. On {date}, the Agency again wrote to the Applicant inviting the Applicant to rescope the terms of the Applicant's request.
6. On [date], the Applicant responded to the Agency, agreeing to narrow the request by removing invoices from the request. The Applicant's amended request therefore sought access to the following documents:

Financial records outlining salaries and expenses, pertaining to the office of the opposition, for the period [date] to [date]
7. On [date], the Agency wrote to the Applicant stating the amended request is unlikely to remove the grounds for refusal and invited the Applicant to consider narrowing the timeframe.
8. On [date], the Applicant responded to the Agency, declining to further refine the scope of their request.
9. On [date], the Agency wrote to the Applicant asking if the provision of operating statements as at the end of each financial year showing actual spend on all categories of expenses, including salaries and wages, would meet the terms of the Applicant's request.
10. On [date], the Applicant responded to the Agency, stating they seek access to the line item versions of the reports.
11. On [date], the Agency wrote to the Applicant inviting the Applicant to narrow the scope of their request to the [date] transaction report and the [date] operating statements.
12. On [date], the Applicant responded to the Agency, again declining to further refine the scope of their request in line with the Agency's suggestion.
13. On [date], the Agency wrote to the Applicant advising the Agency will proceed to make a final decision if the Applicant does not engage in further consultation with the Agency or narrow the scope of the request to remove the grounds of refusal by 5 August 2022.
14. On [date], the Applicant responded to the Agency, indicating the Applicant does not intend to further refine the scope of their request.

15. 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 the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
16. The Agency's decision letter sets out the reasons for its decision.

Review application

17. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
18. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
19. I have considered all communications and submissions received from the parties.
20. 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.
21. 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 refusal under section 25A(1)

22. 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.
23. 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.
- ...

24. In *Secretary, Department of Treasury and Finance v Kelly*,¹ 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...

- 25. The words 'substantially' and 'unreasonably' are not defined in the FOI Act and are to be given their ordinary meaning.
- 26. '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
- 27. 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.³
- 28. 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

¹ [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 & Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

Consultation requirements under section 25A(6)

29. 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.⁵
30. As stated above, the Agency notified the Applicant of its intention to refuse their request and nominated an Agency officer with whom they could consult with a view to making the request in a form that would remove the proposed grounds for refusal. The Agency provided suggestions for narrowing the scope of the request.
31. 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 grounds for refusal.
32. I note the Applicant engaged in this consultation process including amending their FOI request to remove invoices. However, the Agency decided this did not sufficiently narrow the scope of the request to remove grounds for deciding not to process the request.
33. In this case, I consider it is appropriate for my review to be based on the Applicant's amended review request of [date].
34. Firstly, I am required to determine whether processing the Applicant's request would involve a substantial diversion of the Agency's resources.
35. If I am satisfied that processing the request would involve a substantial diversion of resources, I am then required to determine whether such a diversion would be unreasonable.

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

36. When determining whether to refuse a request, it is sufficient for an agency to estimate how much time and effort would be spent to process the request. To require that the issue be determined with absolute certainty would compel an agency to undertake the very work that section 25A(1) is designed to avert.⁶
37. In its consultation and decision letters sent to the Applicant, the Agency provided details regarding the initial searches it conducted, the quantity of documents relevant to the terms of the Applicant's request and the time and staff resources required to process it. In addition, the Agency also provided submissions in support of its decision.
38. In summary, the Agency advises:
 - (a) Requests for expenditure information often take a long time to review due to the nature of the information contained in the relevant documents and particularly the external consultation required.
 - (b) It is estimated that assessing the documents would divert the resources of one senior FOI officer for approximately four workdays, working eight hours per day (333 pages at five minutes per page). This is only an estimate of the preliminary work involved and does not include the time required to consult with business undertakings regarding their commercial affairs information, and consulting with the Office of the Leader of the Opposition, among other processing requirements. This would

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

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

be likely to significantly impact the ability of the FOI and Privacy team to process other requests on hand and meet the statutory timeframes for these requests.

- (c) The Agency generated a transaction report for a one-year period ending [date] (**Generated Transaction Report**) to estimate the resources involved in processing the request. A transaction report covering one financial year contains approximately 800 individual line entries (amounting to 111 pages in a PDF document).
- (d) The Generated Transaction Report includes a “vendor name” category which includes the names of many individuals and business undertakings. An FOI officer would be required to carefully assess the transaction report line-by-line to determine whether consultation was required, particularly under sections 33(1) and 34.
- (e) The Generated Transaction Report filtered by the ‘Vendor Name’ column contains 456 rows including personal information and also business, commercial or financial information. From this, 280 of the rows include business, commercial or financial information from approximately 29 different companies or organisations.
- (f) It is estimated there may be up to 22 Shadow Ministers with chiefs of staff who would need to be consulted under section 33(1). Consulting with 22 chiefs of staff would conservatively take around 30 minutes per individual, amounting to 11 hours of consultation time or 1.3 full working days.
- (g) Given that there are three transaction reports in scope of the request and assuming that a similar amount of consultation would be required for the other two spreadsheets, the total consultation time under section 34 of the Act would amount to six full working days. This is in addition to the four working days for preliminary assessment detailed in the Agency’s decision letter.
- (h) This overall estimate of time also excludes the assessment time for the Operating Statements in scope of the request, and necessary internal consultation with the Finance branch and any other relevant branches of the Department.
- (i) The Agency mostly receives topical FOI requests, which take longer to process than non-topical requests.
- (j) The Agency’s team has other responsibilities alongside FOI processing, including providing advice on privacy policy and assisting with Privacy Impact Assessments.
- (k) Based on previous requests for information for much shorter time periods (approximately three months to one year), the average elapsed time to process such requests is between three to five months, or around 90 to 150 days. Notably, these requests amounted to between 30-90 pages in length which is considerably less than the current request.

This also considers that an FOI officer would not be working on a single request for 10 full working days, eight hours per day consecutively, given the volume of other FOI requests the Agency is managing from other applicants as well as the range of other requests submitted by the Applicant and the FOI and Privacy team’s other day-to-day responsibilities.

- (l) It is expected that processing this request without adversely impacting the processing of requests of other applicants would likely take approximately 60-90 days of elapsed time. On the basis that an FOI officer evenly balanced their other responsibilities, assessment and consultation stages alone would take 45 working days of elapsed time. Even if no consultation occurred in relation to chiefs of staff, the requirement to consult in relation to commercially confidential information would mean processing this request would take between 45-75 days of elapsed time, with the expectation that it will be at the higher end of the range.

39. The Agency further provided details of its current staff resourcing and FOI caseload which I have considered.
40. At my request, the Agency provided my office with the Generated Transaction Report and I have examined this document.

41. In relation to consultation, the Agency submits:

... DPC's view is that consultation is likely practicable, and would result in an unreasonable diversion of resources.

... we consider that the reference to consultation not being practicable relates to a single consultation and matters that relate to that contact (for example, because they are travelling or not contactable). That is, we cannot decline to consult because there are a lot of other individuals who would need to be consulted, or because we have a heavy FOI workload.

Even if DPC decided that the section applied and it was not practicable to consult given the numbers involved, and instead DPC only merely *notified* affected individuals under section 33(3) (which would in itself involve significant work), it is nevertheless possible that some of those individuals may apply for review. This outcome would be avoided had consultation occurred and all factors been considered in whether disclosure of the personal affairs information is reasonable.

Similarly, when there are a large number of individuals or organisations to consult and a department does not receive a response and makes a decision based on the information available, or decides that disclosure is not unreasonable, a department is required to inform third parties of their review rights in detailed correspondence outlining how that decision was made. This is a time-consuming but important process and should also be considered when taking into account consultation requirements in relation to the reliance on section 25A in this case.

42. On the matter of consultation, section 33(2C) provides:

... an agency is not required to notify a person if –

- (a) the notification would be reasonably likely to endanger the life or physical safety of that person, or cause that person undue distress, or is otherwise unreasonable in the circumstances; or
- (ab) the person to be notified is a primary person, and the notification would be reasonably likely to increase the risk to that person's safety from family violence; or
- (b) it is not practicable to do so.

43. Section 34(3) requires an agency to consult an undertaking in deciding whether the disclosure of information would expose an undertaking unreasonably to disadvantage, 'if practicable'.

44. Section 25A(2)(b)(ii) states that, in estimating whether an FOI request will involve an unreasonable diversion of resources, an agency can consider 'the resources that would have to be used in consulting with any person or body in relation to the request'. The emphasised words indicate that, when relying on section 25A(1), any such consultation needs to be likely, rather than merely possible.

45. While on its face section 33(2B) provides that, in deciding whether disclosure of a document would involve unreasonable disclosure of personal affairs information, an agency must notify affected persons and seek their view about whether disclosure should occur. Section 33(2C) relieves that obligation to consult where it is 'not practicable'. The wording in section 34(3) also similarly relieves that obligation to consult with an undertaking.

46. In deciding whether consultation is practicable under sections 33(2C) and 34(3), a key factor would be the resources of the Agency to undertake consultation. It could potentially be argued that it is likely that not all the identified Agency staff and third party undertakings would need to be consulted as this amount of consultation may be deemed 'not practicable'. Thus, an agency would not be able to rely on the burden of consulting when deciding whether section 25A(1) applied as it would be unlikely that consultation that is practicable would result in an unreasonable diversion of resources.
47. In the current circumstances, and after having examined the Generated Transaction Report, I accept the Agency's advice that consultation is likely practicable, rather than merely possible. I also acknowledge the Agency would need to consult with the Office of the Leader of the Opposition as part of their processing requirements.
48. 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 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?

49. 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

50. 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*,⁸ in which the Victorian Civil and Administrative Tribunal (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 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 Applicant's amended request 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 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 *Mildenhall v Department of Education*, VCAT held:

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).

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 acknowledge there is a public interest in the disclosure of the documents, given they concern the expenditure of public funds.

However, on the information before me, I am not satisfied this interest in 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 the diversion of resources 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 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 further note, the Agency's estimate includes the time for an Agency FOI officer to undertake consultation with third parties 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 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.

I acknowledge the Applicant initially took a cooperative approach by agreeing to narrow and amend the scope of their request. However, the Applicant did not adopt nor take on board the Agency's further 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 assessment required to process the request I am satisfied the Agency would not be able to process the request and make a decision within the statutory timeframe limit.

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

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.

51. Having considered the above factors, I am satisfied processing the request would also involve an unreasonable diversion of the Agency's resources.
52. 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

53. 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.
54. 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.
55. 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 and the work involved in the Agency processing the request.

Review rights

56. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
57. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
58. 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.
59. 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
60. 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.

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

¹² Section 52(5).

¹³ Sections 50(3F) and (3FA).