

## Notice of Decision and Reasons for Decision

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Applicant:	'DM9'
Agency:	Victoria Police
Decision date:	13 August 2021
Provision considered:	Section 25A(1)
Citation:	'DM9' and Victoria Police (Freedom of Information) [2021] VICmr 244 (13 August 2021)

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FREEDOM OF INFORMATION – police records – Law Enforcement Assistance Program (LEAP) audit – processing would not substantially and unreasonably divert the resources of the Agency

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied the work involved in processing the Applicant's request would substantially and unreasonably divert the resources of the Agency from its other operations.

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

13 August 2021

## Reasons for Decision

### Background to review

1. The Applicant, through their legal representative, made an FOI request to the Agency seeking access to the following documents:
  - \* documents evidencing by reference to date and person, the number of times our client's file with Victoria Police has been accessed since [date],
  - \* documents relating to attempts by any member of Victoria Police to access our client's telephone records since [date], and
  - \* documents evidencing any attempt by any member of Victoria Police since [date] to access any email address belonging to our client, and
  - \* documents evidencing any attempt by any member of Victoria Police since [date] to access our client's internet browsing history or metadata.
2. By letter dated [date], the Agency wrote to the Applicant in accordance with section 25A(6) notifying of its intention to refuse to grant access to documents in accordance with the Applicant's request under section 25A(1) on grounds it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
3. The Applicant was invited to consult with the Agency with a view to removing the proposed grounds for refusal by refining the scope of the request. The Applicant declined the invitation to refine the terms of their request.
4. In its decision letter dated 13 January 2020, the Agency notified the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1).

### Preliminary view

5. On [date], the Agency was provided with a preliminary view from OVIC that it was not apparent the requirements of section 25A(1) were satisfied based on its estimate of time to process the LEAP records only. The Agency was invited to make a fresh decision or provide a further submission in support of its decision.
6. The Agency responded maintaining its decision. The Agency also provided OVIC with more information about the work involved in processing of the request. The Agency's submission is set out below.

### Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

11. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

## **Review of exemptions**

### **Section 25A(1)**

12. 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).
13. 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... 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 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.

14. 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 individuals right of access to information] 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.

- 15. The words 'substantially' and 'unreasonably' are not defined in the FOI Act and are to be given their ordinary meaning.
- 16. The meaning of the words '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 applicant's FOI request.<sup>2</sup>
- 17. Once an agency has decided to refuse to grant access to a request under section 25A(1), it bears the onus of establishing it has met the requirements of the exemption.<sup>3</sup>

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

- 18. A decision to refuse a request under section 25A(1) cannot be made unless an agency gives notice to an applicant in accordance with section 25A(6), as set out above.
- 19. On [date], the Agency wrote to the Applicant regarding their request. In doing so, the Agency:
  - (a) Advised of its intention to refuse access to the requested documents.
  - (b) Identified an Agency officer with whom the Applicant could consult with a view to making their request in a form that would remove the ground for refusal.
  - (c) Provided the Applicant with a reasonable opportunity to consult (from 2 December 2020 until its decision of 13 January 2021), which is more than the 21 days as required by Professional Standard 5.2.
  - (d) However, I consider the Agency in writing to the Applicant in accordance with section 25A(6) could have provided further information to assist the Applicant in making their request in a form that could be processed. For example, by providing suggestions as to how the Applicant could narrow the scope of their request to make it a reasonably manageable.<sup>4</sup>
- 20. While I am not entirely satisfied the requirements of section 25A(6) have been met, as discussed above, I have also considered the remaining requirements of section 25A(1) as follows.

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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> See for example, <https://ovic.vic.gov.au/decision/ag8-and-victoria-police-freedom-of-information-2019-vicmr-62-12-july-2019/> where in a similar matter the Agency provided advice to the applicant about how they could narrow the scope of the request.

### ***Review of application of section 25A(1)***

21. In my review of this matter, I must consider:

- (a) whether processing the request would involve a substantial diversion of the Agency's resources, and
- (b) 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?*

22. 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:

...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.

23. The Agency submits the following in relation to the estimated work involved in processing the Applicant's request:

The voluminous nature of this request lies in the work involved in conducting a LEAP audit for this applicant. There is significant work required in consulting with members on two fronts, firstly in relation to the release of their personal information and secondly, and more importantly, seeking their advice as to whether the release of the fact that they looked up the applicant on LEAP would undermine a police investigation.

The second enquiry requires FOI staff to enquire separately with each member as to whether release of a specific look up would be exempt in accordance with section 31(1)(a) of the Act. This requires a separate email to be sent to each member attaching only that portion of the LEAP audit that relates to their activity regarding access to an applicant's LEAP records. That means that for every member identified in an audit, FOI staff are required to draft a separate email and attach the relevant portion of the LEAP audit. The responses to these emails then need to be assessed by FOI staff to see if the record is indeed exempt under section 31(1)(a). We have found that a reasonable number of members to contact before such requests represent a substantial and unreasonable diversion of resources is around 15 members.

The specific request that is the subject of this review has identified that 29 members have accessed the applicant's LEAP records over the stipulated period. As you can see this is significantly more than the 15 members we consider reasonable.

The work involved in consulting in relation to LEAP audits is exacerbated by the other parts of this request for details of attempted access to the applicants email, browser history and telephone records.

24. I also note the Agency advised the Applicant their request in relation to the LEAP audit produced 174 records.

25. The Agency did not provide a detailed estimate of the time required to assess the documents and conduct any required consultation as each Agency officer '...is consulted initially by email and this frequently results in telephone conversations as well'.

26. While I note the Agency's submission relates to one part of the request only, based on the information before me, I am not satisfied processing the Applicant's request would substantially divert the resources of the Agency from its other operations.

27. Rather, I consider sending 29 emails to internal staff, in a similar format and for similar reasons is not substantial in the context of processing an FOI request for an Applicant's own police records. I also consider the assessment of such records would not be a complex task as it relates only to limited information – being who accessed the applicant's records.

28. The Agency has not provided any information about why the processing of the remainder of the request would be substantial.

29. While I have determined there is insufficient information before me to determine the processing of the request would be a substantial diversion of the Agency's resources, I have further considered whether the processing of the request would also be unreasonable as follows.

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

30. The meaning 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 necessary to show... that the extent of unreasonableness is overwhelming. It is this Tribunal's task to weigh up considerations for and against the situation and to form a balanced judgement of reasonableness based on objective evidence.<sup>5</sup>

31. 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>6</sup> in which VCAT considered the following factors in determining if a request would involve an unreasonable diversion of 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 documents sought within a reasonable time and with the exercise of reasonable effort

I consider the clear terms of the Applicant's request and nature of the requested documents are sufficiently precise to enable the Agency to locate the documents within a reasonable time and with the exercise of reasonable effort as described above.

- (b) The public interest in disclosure of documents relating to the subject matter of the request

Consistent with the object of the FOI Act, there is a public interest in members of the public having a right to access information and documents held by government agencies, including when the documents relate to their interaction with government and police, unless it is necessary to refuse access under an exception or exemption in the FOI Act necessary to protect an essential public interest.<sup>7</sup>

While I note the Applicant has a personal interest in obtaining access to the documents, I consider there is a strong public interest in members of the public being able to access official records held by the Agency in relation to an applicant, including their interaction with police, subject to any legitimate ground for exemption, such as law enforcement or personal privacy of other persons.

- (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 available for dealing with FOI applications

In this regard, the Agency submits:

The fact that currently Victoria Police has a significant number of other requests to be completed (over 2,300 active requests currently on hand) is also a relevant factor supporting our view that this request is 'voluminous'. Processing this request would also negatively impact on our ability to progress current workloads and deliver objectives. This is unfair on other FOI applicants who are also seeking access to documents. Lastly, we note that the applicant did not engage in our request to consult over the size of his request.

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<sup>5</sup> *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

<sup>6</sup> *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

<sup>7</sup> Section 3(1).

I acknowledge the large number of FOI requests the Agency is currently processing and the significant burden that places on its FOI Unit and its other Agency officers.

I also acknowledge the compounding impact of the COVID-19 pandemic on the Agency's ability to process requests.

However, as described above, I must consider the purpose of the FOI Act and the context of this particular request in which the Applicant seeks access to information they consider important to understanding their interactions with Victoria Police.

In these circumstances, I do not consider the time to process the request is unreasonable, even with the workload currently on hand.

Therefore, I am satisfied the request is a reasonably manageable one.

(d) The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a cooperative approach to redrawing the boundaries of the application

I accept the Agency's initial assessment of the work involved in locating relevant documents.

As described above, I am not entirely satisfied the Agency provided the Applicant with sufficient information to narrow the scope to one in which the Agency considered could be processed.

While I note the Applicant refused to narrow the scope of their request, the Applicant is not required to where the request can reasonably be processed.

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

I note the Agency is currently experiencing significant delays in making FOI decisions within legislative timeframes.

In this matter, the Applicant seeks access to specific documents that contain information about themselves. In these circumstances, I consider the overall purpose of the FOI Act outweighs the current workload of the Agency's FOI Unit.

Rather, consistent with Professional Standard 9.1, the Agency is required to ensure its FOI Unit has sufficient resources to process such requests:

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

## **Conclusion**

32. Having considered the above factors and on the information before me, I am not satisfied the work involved in processing the request would substantially or unreasonably divert the resources of the Agency from its other operations.
33. Accordingly, I am not satisfied the requirements for refusal to grant access to documents in accordance with the Applicant's request under section 25A(1) are met, and the Agency is required to process the Applicant's request.

## **Review rights**

34. If the Agency is not satisfied with my decision, it is entitled to apply to VCAT for it to be reviewed.<sup>8</sup>
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
36. 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.
37. 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.<sup>10</sup>

## ***When this decision takes effect***

38. My decision does not take effect until the Agency's 14 day review period expires.

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<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(9).

<sup>10</sup> Sections 50(3F) and (3FA).

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