

Notice of Decision and Reasons for Decision

Applicant:	'FE7'
Agency:	Latrobe City Council
Decision date:	23 May 2023
Provision considered:	Section 25A(1)
Citation:	'FE7' and Latrobe City Council (Freedom of Information) [2023] VICmr 51 (23 May 2023)

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

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

23 May 2023

Reasons for Decision

Background to review

1. On [date], the Applicant made a request to the Agency seeking access to:

All meeting minutes / notes, all correspondence (letters, email, notes) pertaining to [named road] from [date] to current between the following parties [seven named third parties].

All documents pertaining to Planning Permit [reference number] and endorsed plan including application, letters, email diary entries, meeting notes / minutes between the following parties CFA and their responsibilities, [six named third parties].

All documents pertaining to Pathway request [reference number] including letters, email, meeting notes / minutes between the following parties [six named third parties].

Independent Review of Environmental Site Assessment.

Completed Environmental Site / Assessment by [third party] dated [date] Ref:[reference number]

All documents pertaining to VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL PLANNING AND ENVIRONMENT DIVISION PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NOS. [NUMBER] PERMIT APPLICATION NO. [REFERENCE NUMBER] including amended plans that compile with the VCAT Order any variations that have been made by Latrobe City Council to this order.

All letters, email diary entries, meeting notes / minutes between the following parties [other government agency] and their responsibilities, [six named third parties].

2. On [date], the Agency wrote to the Applicant in accordance with section 17(2) seeking clarification about the terms of the Applicant's request as the Agency considered the request was not clear enough to enable it to reasonably identify the requested documents.
3. The Applicant provided their response. However, on [date], the Agency contacted the Applicant inviting them to further clarify the terms of their request under section 17(2).
4. On [date], the Applicant further clarified the terms of their request and the Agency accepted the request as valid under section 17.
5. The Applicant's amended request terms are:

Part 1

All correspondence between:

- [third party];
- [third party];
- [third party];
- [third party];
- [third party];
- [third party]; and
- [third party]

For the date range of [date] to present with the topic/subject of the [named Road] Closure.

Part 2

All documents pertaining to Planning Permit 2018/128 and endorsed plan including application, letters, email diary entries, meeting notes/minutes between the highlighted parties.

- [other Government Agency] and their Representatives;
- [third party];
- [third party];
- [third party];
- [third party];
- [third party]; and
- [third party];

Part 3

You have requested all documents pertaining to Pathway request 773633 including letters, email, meeting notes/minutes between the following parties [third party], [third party], [third party], [third party], [third party], [third party].

Part 4

Independent Review of Environmental Site Assessment between [date to date] for the properties of:

- [address];
- [address];
- [address];
- [Reference numbers].

Part 5

The Environmental Site Assessment by [third party] dated [date], [reference number].

Part 6

You have requested all documents pertaining to Victorian Civil and Administrative Tribunal (VCAT) matter [reference number] including any amended plans that comply with the VCAT Order and any variations that have been made by [the Agency] to this order, together with all letters, email diary entries, meeting notes/minutes between the following parties: [other Government Agency] and their representatives, [third party], [third party], [third party], [third party], [third party], [third party].

6. 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.
7. 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.
8. On [date], the Applicant and the Agency consulted in person, implementing some of the Agency suggestions but ultimately the scope of the request remained broad in relation to Part 2 of the request.
9. Following the meeting on [date], the Applicant confirmed their amended request for:

Part 1

All correspondence between:

- [third party];
- [third party];
- [third party];
- [third party];
- [third party];
- [third party]; and
- [third party]

For the date range of [date] to present with the topic/subject of the [named Road] Closure.

Part 2

All correspondence between:

- [other Government Agency] and their Representatives;
- [third party];
- [third party];
- [third party];
- [third party];
- [third party]; and
- [third party];

Containing the planning permit number “2018/128”; and

Council held documents (further on from correspondence) that contains the planning permit number “2018/128”

Part 3

- A copy of the Pathway report for Pathway number “[Number]”
- All correspondence containing the pathway number “[Number]”

Part 4

The preliminary independent review and independent review of Environmental Site Assessment between for [address] between the [date] to [date].

Part 5

The Environmental Site Assessment for the Corner of [address] and [address] conducted by [third party] during [date].

Part 6

The amended Plans that were then endorsed following the VCAT hearing for [Reference Number] for the Corner of [address and [address]

Correspondence between:

- [other Government Agency] and their representatives;
- [third party];
- [third party];
- [third party];

- [third party];
- [third party]; and
- [third party];

Related to the listed parties directly working on the management of VCAT matter “[Reference Number]”

10. By letter dated [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

11. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
12. The Agency was invited to make a written submission under section 49H(2) in relation to the review.
13. During the review, the Applicant was provided with an initial view that a Commissioner would likely to determine processing 3,200 pages would involve a substantial and unreasonable diversion of the Agency’s resources from its other operations. In the interests of seeking to informally resolve the matter, the Applicant was invited to further narrow the terms of their request with a view to it being able to be processed by the Agency.
14. Following the Applicant’s response to OVIC’s initial view and an assessment of the Agency’s submissions and its grounds for relying on section 25A(1), as attempts to resolve the matter informally were unsuccessful the review progressed to a formal review decision.
15. I have considered all communications and submissions received from the parties, including the Applicant’s response to the initial view provided.
16. 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.
17. 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)

18. 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.

19. 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....

20. 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 ...

21. The words 'substantially' and 'unreasonably' are not defined in the FOI Act and are to be given their ordinary meaning.
22. '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
23. 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

Consultation under section 25A(6)

24. A decision to refuse to process a request under section 25A(1) cannot be made unless an Agency provides notice to an Applicant stating its intention to refuse the applicant's request and nominates an Agency officer with whom the Applicant can consult, provides a reasonable opportunity for the Applicant to consult and lastly, provides information to assist the Applicant in amending their request to a form that would remove the proposed ground for refusal.⁴
25. As detailed in paragraphs 5-6 above, 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 being more specific about the context of each subject matter that is mentioned and being more specific about what categories of documents they are seeking.
26. In response, the Applicant consulted with the Agency in person, and implemented some of the suggestions the Agency had provided. The Agency indicated that the amendments made to the request did not sufficiently narrow the scope of the request and there was a reasonable likelihood the request would be refused under section 25A(1). The Applicant indicated no further amendments to the request were required and that the FOI request is to be processed in its current interpretation.
27. The subsequent letter dated [date] from the Agency to the Applicant confirmed the updated and amended request. As the request had not narrowed since the notice of intention, and in

¹ [2001] VSCA 246 at [48].

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

³ *Ibid* at [11].

⁴ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

fact broadened, the Agency made the decision to refuse to grant access to the documents sought.

28. I am satisfied, before making its decision, the Agency provided the Applicant notice of its intention to refuse access, provided a reasonable opportunity to consult and provided sufficient information to assist the Applicant in making the request in a form that would remove the proposed ground for refusal.

Review of the application of section 25A(1)

29. Following consultation between an agency and an applicant under section 25A(6) and where an agency and an applicant do not reach agreement as to a revised scope for the applicant's FOI request, I must complete my review based on the applicant's original or clarified request. As such, my review in this matter is based on the Applicant's clarified request terms as detailed at paragraph 4.
30. Firstly, I am required to determine whether processing the Applicant's request would involve a substantial diversion of the Agency's resources.
31. 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?

32. 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:⁵

...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. In its consultation letter with the Applicant, and decision letter and submission to OVIC, the Agency provided details regarding the 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 decision letter dated [date], the Agency noted:

...Processing your request would be a substantial diversion of our resources because of the large volume of work required by the wide scope of your request, in particular Part 2 which requires Council to identify and assess every document in its possession containing the term [reference number].

Initial searches indicate that your request captures documents totaling approximately 3,200 pages, with over 30 individuals and companies who need to be consulted in relation to possible exemptions under the FOI Act. To identify, locate and collate the documents captured by your request is estimated to require 214 hours of officer time, and to then examine and consult with third parties in relation to possible exemptions that may apply is estimated to require another 136 hours, for total of 350 hours. This does not include the additional time to redact (where

⁵ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

agreed) and make copies of any released documents as well as notifying affected parties of the decision, which would also be significant.

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

35. In its written submission, the Agency clarified:

Initial searches indicate that the request captures documents totalling approximately 3,200 pages, with over 30 individuals and companies who would need to be consulted in relation to possible exemptions under the FOI Act. As the applicant consented to redaction of personal information for all third parties other than individuals specifically named in the request, this calculation did not include consultation under section 33 of the FOI Act except for those named individuals. The main potential exemption identified as requiring consultation is section 34 (documents relating to trade secrets etc).

To identify, locate and collate the documents captured by the request was estimated to require 214 hours of officer time. This was based on assessment times of 2 minutes per email, 5 minutes per email attachment and 10 minutes per other document. The majority of documents were expected to be emails and email attachments. It is possible that the required time could be greater; Part 2 of the applicant's request seeks "All documents containing the Planning Permit number [Number]", which creates difficulty estimating search times in relation to documents that exist in hardcopy only.

To then examine the documents for possible exemptions and consult with third parties in relation to exemptions that may apply is estimated to require a further 136 hours, being 2 minutes per page for examination and around 30 hours for consultation with the over 30 third parties.

Together the searches and dealing with potential exemptions totals approximately 350 hours. This does not include the additional time to redact (where agreed) and make copies of any released documents as well as notifying affected parties of the decision, which would also be significant.

36. On the information before me and having carefully considered the terms of the Applicant's amended request (see paragraph 8), 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?

37. 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.⁶

38. In determining 'unreasonableness' for the purposes of section 25A(1), I have had regard to the approach adopted by VCAT in *The Age Company Pty Ltd v CenITex*,⁷ in which VCAT considered

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

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

relevant factors when determining if a request involves an unreasonable diversion of an agency's resources. I have considered these factors below in the context of this matter:

- (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 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 interests and the private and business affairs of persons in respect to whom information is collected and held'.⁸

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 that the request, in its current form, is not a reasonably manageable one.

⁸ Section 3(1).

- (d) The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a co-operative 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 in this application

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 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.

39. Having considered the above factors, I am satisfied processing the request would also involve an unreasonable diversion of the Agency's resources.
40. 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

41. 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.
42. 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.
43. Despite my decision, it is open to the Applicant to consider making a new request to the Agency for the documents to which they seek access. The Applicant may wish to consider consulting with the Agency regarding the terms of a new FOI request 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 resources involved in the Agency processing the request.

Review rights

44. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
46. 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.
47. 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.¹¹
48. My decision does not take effect until the relevant review period (stated above) expires.
49. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁹ Section 50(1)(b).

¹⁰ Section 52(5).

¹¹ Sections 50(3F) and 50(3FA).