

Notice of Decision and Reasons for Decision

Applicant:	'FH4'
Agency:	Victorian Building Authority
Decision date:	27 July 2023
Provision considered:	Section 25A(1)
Citation:	'FH4' and Victorian Building Authority (Freedom of Information) [2023] VICmr 73 (27 July 2023)

FREEDOM OF INFORMATION – regulatory documents – regulation of building works – registered builder – building works – investigation file – complaint file – section 25A(1) – work involved in processing the Applicant's request would not substantially and unreasonably divert the resources of the Agency 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.

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 amended 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 under section 25A(1) are met and the Agency is required to process the Applicant's amended request.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

27 July 2023

Reasons for Decision

Background to review

1. On [date], the Applicant made a request to the Agency seeking access to the following documents:
 - See attached FOI decision document for reference
 - Copy of the following files: [file reference numbers]
 - File related to proactive inspections dated [date] and [date]

2. On [date], the Agency emailed the Applicant advising:

On the basis of the contextual information provided in your two emails applications, your application has been interpreted as a request for the following documents:

 1. A copy of the File No [reference number];
 2. A copy of the File No [reference number];
 3. A copy of the File No [reference number];
 4. A copy of the File [reference number];
 5. A copy of the File [reference number];
 6. A copy of the File [reference number];
 7. A copy of the File [reference number].
 8. Date that the Immediate Suspension Investigation ([Agency]) Authority Reference [reference number]) commenced. This document will be produced pursuant to section 19 of the FOI Act.

3. By email dated [date], the Applicant clarified the terms of their request to seek access to:
 1. A copy of the File No [reference number] - **this is [FOI reference], decision due [date]**
 2. A copy of the File No [reference number];
 3. A copy of the File No [reference number];
 4. A copy of the File [reference number];
 5. A copy of the File [reference number];
 6. A copy of the File [reference number];
 7. A copy of the File [reference number].
 8. Date that the Immediate Suspension Investigation ([Agency]) Authority Reference [reference number]) commenced. This document will be produced pursuant to section 19 of the FOI Act.
 9. **File related to proactive inspection dated [date]**
 10. **File related to proactive inspection dated [date]**

4. On [date], the Agency wrote to the Applicant notifying of its intention to refuse access to the requested documents under section 25A(1) on grounds that it considered the work involved in processing the Applicant's request in its current form would substantially and unreasonably divert the resources of the Agency from its other operations. In accordance with section

25A(6), the Agency invited the Applicant to consult on the terms of their request with a view to remove the grounds for refusal.

5. On [date], the Applicant responded to the Agency's notice and reduced the scope of their request to the following documents:

1. A copy of the File No [reference number]
2. A copy of the File [reference number]
3. A copy of the File [reference number]
4. Date that the Immediate Suspension Investigation (Authority Reference [reference number]) commenced. This document will be produced pursuant to section 19 of the FOI [Act].

6. On [date], the Agency emailed the Applicant advising:

Further preliminary inquiries and sampling suggest that there are approximately 255 pages of documents and one video in File [reference number] and at least 60 pages of documents in the other files sought by you. Accordingly, it is considered that as the request presently stands, there are still issues associated with the scope of the request and the amendment of your request has not removed the grounds for refusal previously stated.

7. The Agency provided the Applicant with an opportunity to further refine the terms of their request.

8. By email dated [date] the Applicant agreed to narrow the terms of their request by excluding personal affairs information of third parties and duplicate documents including email chains therefore, requesting access to:

1. A copy of the File No [reference number]
2. A copy of the File [reference number]
3. A copy of the File [reference number]
4. Date that the Immediate Suspension Investigation (Authority Reference [reference number]) commenced. This document will be produced pursuant to section 19 of the FOI [Act].

Personal affairs information of any third parties in the nature of names and contact details

Draft or duplicate documents (including when part of email chains)

(amended request)

9. On [date], the Agency advised of its decision on the Applicant's amended request and refused to grant access to documents under section 25A(1) as it considered the work involved in processing the amended 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 to refuse access.

11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

12. During the review the Agency was provided with my preliminary view that I was not satisfied the requirements of section 25A(1) had been met and given an opportunity to respond. The Agency provided a further submission in support of its position.
13. I have considered all communications and submissions received from the parties.
14. 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.
15. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of the application of section 25A(1)

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
 - © 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.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

- (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
 - © 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*,² 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. The words ‘other operations’ in section 25A(1) includes an agency’s ability to deal with and process FOI requests received where its ability to do so would be impaired with the processing of a request.³

Consultation under section 25A(6)

20. Before refusing to process a request under section 25A(1) an Agency must provide notice to the applicant stating its intention to refuse the applicant’s request, nominate an agency officer with whom the applicant can consult, provide a reasonable opportunity for the applicant to consult and lastly, provide information to assist the applicant in amending the terms of their request to remove the proposed grounds for refusal.⁴

² [2001] VSCA 246 at [48].

³ *Chief Commissioner of Police v McIntosh* [2010] VSC 439 at [24].

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

21. I have reviewed the correspondence between the Agency and the Applicant. I am satisfied the Agency in its emails dated 28 February and 6 March 2023, provided the Applicant with an opportunity to consult in relation to the terms of their request and provided reasonable options to assist them in reducing the terms of the request.
22. Accordingly, I am satisfied the Agency met its consultation requirements under section 25A(6).

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

23. Where an agency and an applicant do not reach agreement as to a revised scope generally, my review will be based on the applicant's original request to the agency.
24. However, in this case, the Agency made its decision based on the Applicant's amended request. Therefore, I have conducted my review on the basis of the Applicant's amended request submitted to the Agency on [date].
25. The Agency bears the onus of establishing that its estimate of the resources required to process the request was 'reasonable' in all the circumstances.⁵ This will usually require detailed evidence of the estimate, including records of how the agency arrived at the estimate.
26. The Agency submits processing the Applicant's amended request would amount to a substantial diversion of its resources. The Agency's submissions provide:

It was estimated that the [Agency] would need to assess approximately 315 pages of documents going back over several years held in electronic and hard copy form. It would require work from at least 9 officers and staff over at least 4 areas within the [Agency] in circumstances where the FOI decision-maker has limited capacity to respond to the request, consistent with attendance to core responsibilities (including that as Legal Counsel).

...[description of Agency current staffing and resources]

It is estimated, based on experience, that it would take approximately 8 weeks to complete processing, decision-making and notification which would give rise to an internal cost of thousands of dollars.

The scope of the request is broad and seeks whole files, it covers multiple areas and individuals within the [Agency], would require a significant time period devoted to processing to enable the other operations of the [Agency] and relevant resources to continue, all of which it is respectfully submitted leads to a conclusion that the diversion of resources to process the request would be substantial.

27. On reviewing the Agency's submissions, I provided my preliminary view that on the information before me I was not satisfied that processing the amended request would amount to a substantial or unreasonable diversion of the Agency's resourcing, particularly noting:
 - (a) the number of estimated pages identified through the Agency's preliminary enquires did not appear to be substantial in number; and

⁵ *McIntosh v Victoria Police (General)* [2008] VCAT 916 (16 May 2008) at [11].

- (b) the documents sought relate to the Agency's regulatory and investigation functions. I consider the Agency should have reasonable familiarity with its own documents and experience in processing similar requests for documents of this nature and established views on the application of exemptions to such documents.

28. In response, the Agency submitted a second submission, which states, in part:

In accordance with the estimate prepared in considering the appropriateness of section 25A, the work to process the request would take about eight weeks. As an estimate, this is not determinative. Even where the documents or content are, broadly, familiar to the processing officer, the specificity required to determine if an exemption may apply, particularly given the variation in investigation content and its often-confidential nature, means the processing officer must pay close regard to the material, on a case by case basis. It is also likely given the nature of the documents that consultation would be required, which increases the resource demand taken up by the processing. In view of this it is also relevant to consider that the number of documents is not determinative of whether the request would cause an unreasonable and substantive diversion of resources.

...

The resource considerations occur in the context where there is no clear public interest that can be discerned from the request and the applicant has had the benefit of approximately 18 FOI requests considered, and most granted in part, in approximately the last 12 months. That is to say, that the applicant is not without information on the subject that appears to be of notable personal interest, where the agency has a responsibility to attempt to balance the intersecting rights of all FOI applicants.

29. Based on its preliminary assessment, the Agency estimate it would take up to eight weeks to process the Applicant's amended request, which would involve approximately 300 pages of documents.
30. I accept the Agency's estimate that the processing of the request would return up to 300 pages of documents. While the number of documents may be considered significant to the Agency, in examining the other contested section 25A(1) matters, the Agency's document estimate would be considered at the lower range of the spectrum.⁶ While I acknowledge that the volume of documents alone is not determinative, it can be a fair indicator of the amount of work involved in processing an FOI request. The Agency further advises that consultation would need to be undertaken with nine Agency officers, across four business areas, to provide input relevant to a decision being made under the FOI Act.
31. In considering the information available to me, I do not accept that the level of consultation to be undertaken within the Agency would be as burdensome as indicated by the Agency's submissions. It is likely the topics dealt with by the documents in this request would repeat consultation undertaken in previous FOI requests made for similar documents by the Applicant to the Agency.
32. The Agency's decision letter states that to process the requests would result in 'a very significant internal cost to the VBA ..., likely to be in the thousands of dollars'. However, section 25A(3) expressly provides that an agency 'is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind'.

⁶ *The Age Company Pty Ltd v CenITex* (Review and Regulation) [2013] VCAT 288 summarised a number of VCAT and other Tribunal decisions [43]-[45,] which drew upon *Cianfrano* at [62]-[64], *Davis v Suburban Rail Loop Authority* (Review and Regulation) [2021] VCAT 627 at [214]-[226].

Therefore, the Agency's estimate concerning the cost involved in processing the amended request is not a relevant consideration.

33. Regarding the Agency's submissions concerning resources, what I understand it is suggesting is that they are limited, and only non-dedicated resources are available to process FOI requests. I note the Agency received 405 non-personal FOI requests in the 2021-22 financial year.⁷ The Agency's annual report for this period also lists four Agency FOI decision makers.⁸
34. In all of the circumstances, I do not accept the work involved in processing the Applicant's request would substantially divert the resources of the Agency from its other operations.
35. Nonetheless, I have also considered whether the work involved in the Agency processing the request would involve an unreasonable diversion of the Agency's resources.

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

36. 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.⁹

37. In determining 'unreasonableness', for the purposes of section 25A(1), I have had regard to the approach adopted by the Victorian Civil and Administrative Tribunal (VCAT) in *The Age Company Pty Ltd v CenITex*,¹⁰ in which VCAT considered relevant factors when determining if a request would involve an unreasonable diversion of an agency's resources. I consider 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

In relation to this factor, the Agency submits:

...the terms of the request offered a sufficiently precise description to permit the [Agency] to understand what was sought, but that could not be done within a reasonable time and with the exercise of reasonable effort. It would involve more than reasonable effort and impact on several areas of the [Agency] and a number of officers or staff.

It can be seen that the amended request seeks access to three specific investigation files held by the Agency, as well as a document to be produced by the Agency under section 19, stating when an immediate suspension investigation commenced.

While the Agency argue relevant documents could not be identified within a reasonable time, no direct evidence to support its contention beyond that it may impact four

⁷ *Office of the Victorian Information Commissioner, 2021-22 annual report*, see data for the Victorian Building Authority at p 134 <https://ovic.vic.gov.au/wp-content/uploads/2022/09/OVIC-Annual-Report-2021-22-Digital.pdf>.

⁸ *Ibid* at p 167.

⁹ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

¹⁰ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

business areas was submitted. For example, no evidence was provided to explain the difficulties involved in retrieving documents from systems, or any complexities impacting how the Agency manages investigation files that would assist my understanding as to how identifying documents could not be undertaken within a reasonable time or with the exercise of reasonable effort.

Therefore, on the information before me, I consider the terms of the Applicant's request are sufficiently precise to enable the Agency to identify relevant documents within a reasonable time and with reasonable effort, also noting the preliminary enquiries already undertaken by the Agency in this matter.

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

In relation to this factor, the Agency submits:

...although there is a public interest in maximizing disclosure of documents, that needs to be weighed against the existence of exceptions in the FOI Act such as s 25A(1) designed to avoid an agency being diverted from its core work by needing to process very broad-ranging requests. The request is for whole files and not specific documents or categories of documents. Even if the applicant has a personal interest in obtaining access to the documents, there is nothing to suggest a broader public interest served by disclosure. Any private or personal interest of the applicant would not, it is submitted outweigh the public interest in a smaller agency such as the [Agency] being diverted from its other operations due to the terms of the FOI request which were not sufficiently narrowed...

Consistent with the object of the FOI Act, there is a public interest in members of the public having a right to access information held by government agencies, limited only by an exception or exemption in the FOI Act to protect 'essential public interests'. In this case, I also find that there is a strong public interest in the disclosure of the Agency's decision making process relating to its regulatory and compliance functions.

As detailed above, I am not satisfied that processing the amended request would substantially divert the Agency from its core operations. Consequently, I see the public interest lies in individuals being able to access official records held by an agency, particularly in instances where information held may concern or affect them directly.

(c) Whether the request is a reasonably manageable one, giving due but not conclusive regard, to the size of the Agency and the extent of its resources usually available for dealing with FOI applications

In relation to this factor, the Agency submits:

...the request was not a reasonably manageable one given the size of the [Agency] and extent of resources usually available for dealing with FOI applications (outlined earlier), particularly where it should be noted that the impact would extend beyond the FOI area to at least 4 areas of the [Agency] if the request was required to be processed. It is not just about identifying documents, which are readily identifiable, but needing to obtain information from other to enable an informed decision to be made and the impact that has on the [Agency].

The Agency's submissions also explain that it currently employs two full time staff allocated to handle FOI requests received by the Agency and one part time staff

member to provide FOI support, all of whom undertake these duties in conjunction with other Agency duties.

In addition, the Agency's second submissions states:

Furthermore, having regard to the time estimate, it is not possible to complete the processing in the required timeframe. To meet the timeframe resources would necessarily need to be redirected from other operations, if possible, including other FOI requests. Having regard to the need for an authorised decision maker to make the decision, the additional resources would have limited utility in the exemption examination and consultation process described above. While additional resources in or improvements to FOI processing can be sought, and are regularly considered, the process to consider and seek approval for such changes could not be managed within the time required to process the request.

The resource considerations occur in the context where there is no clear public interest that can be discerned from the request and the applicant has had the benefit of approximately 18 FOI requests considered, and most granted in part, in approximately the last 12 months. That is to say, that the applicant is not without information on the subject that appears to be of notable personal interest, where the agency has a responsibility to attempt to balance the intersecting rights of all FOI applicants.

When determining whether to refuse a request, it is only possible for an agency to estimate how much time and effort would be spent to refuse the request. To require that the issue be determined with absolute certainty would compel the agency to undertake the very work that section 25A(1) is designed to avert.¹¹

As Her Honour Judge Harbison states in *McIntosh v Victoria Police*:

I am aware that precision is not required, but it appeared to me that the respondent had not grappled with the question of what time and resources would reasonably be involved.¹²

While the Agency estimates it would take eight weeks to process the amended request based on its previous experience of processing other FOI requests; however, I consider the assumptions put forward do not turn to the particular circumstances of this matter. I have considered the material provided, however there is no direct evidence as to how the processing of the amended request would adversely impact the processing of other FOI requests, or the other core functions of the Agency. Therefore, based on the material provided, I am not satisfied the Agency would take the estimated eight weeks to process the Applicant's amended request.

Preliminary inquiries made by the Agency indicate there are possibly 300 pages of documents and consultation required to be undertaken with approximately nine Agency officers across four departments. As already noted, I am not satisfied that the level of consultation involved would amount to, or contribute to, an unreasonable diversion of the Agency's resources.

I also note the Agency's submissions advise the Agency has processed a number of the Applicant's FOI requests over the past 12 months. Without having the details of those requests before me I do however, consider the amended request would contain topics

¹¹ *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

¹² *Ibid* at [29].

or matters that overlap with those already considered in previous FOI decisions provided to the Applicant.

Further, while the Agency raise issues regarding its size and limited resources to deal with FOI matters, I believe this factor must be carefully balanced, bearing in mind the obligations placed on an agency to ensure it is adequately resourced to carry out its FOI functions across the Agency.

In considering the information before me I am satisfied the amended request is a reasonably manageable one.

(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

In relation to this factor, the Agency submit:

The [Agency's] initial assessment of likely documents and impact proved, upon further inquiry, to be an underestimate even after the applicant amended his request. The applicant clearly took a co-operative approach in redrawing the boundaries of the request, but it may have been more helpful in seeking particular documents rather than whole files, despite the practical suggestions proffered by the [Agency]. There was nothing more the [Agency] could do to assist the applicant to narrow the request apart from what it did, short of processing the request (contrary to what this provision is designed to achieve)...

I accept the Agency's initial assessment regarding the work involved in processing the Applicant's first request.

Having reviewed the correspondence between the Applicant and the Agency, I am satisfied the Agency provided options to the Applicant to narrow the scope and the Applicant took a reasonable approach to redraw the boundaries of the request to one that is more manageable for the Agency.

(e) The statutory time limit for making a decision in this application

In relation to this factor, the Agency submits:

... the [Agency] would not be able to process the applicant's amended request within the statutory time limit for decision making, even noting potential for extensions of time which the [Agency] could rely upon under s 21. From the applicant's correspondence during consultation, it would be highly unlikely that the applicant would agree to extensions under s 21 of the FOI Act...

On the information before me, I am satisfied the Agency would be able to process the request within the statutory time limit for making a decision under section 21. In any case, in the event processing the request would require more time, section 21(2) provides the Agency could request the agreement of the Applicant to obtain an extension of time. Accordingly, I do not accept the statutory time limit is a barrier to the Agency processing the request.

38. Having considered the above factors, I am not satisfied any diversion of the Agency's resources would be unreasonable.

Conclusion

39. On the information before me, I am not satisfied the work involved in the Agency processing the Applicant's amended request would substantially and unreasonably divert the resources of the Agency from its other operations.
40. Accordingly, I am not satisfied the requirements for refusal under section 25A(1) are met and the Agency is required to process the Applicant's amended request.

Review rights

41. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
44. 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.
45. 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.¹⁶

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and 50(3FA).