Vorchheimer v Victoria Police (Review and Regulation) [2024] VCAT 537 (17 June 2024)

The facts

On 12 November 2021 the Applicant made an access request for documents relating to a traffic infringement.

On 26 November 2021, a standard letter was sent to the Applicant confirming receipt of the request and advising that requests were being finalised an average of 20 weeks after the statutory period of 30 days. The Applicant was invited to advise the Agency whether the documents were urgent. No request for priority was made.

In early June 2022, the Applicant made a delay complaint to OVIC. Then, on 26 July 2022, the Applicant made an application to VCAT on a deemed refusal. A directions hearing was listed for 29 September 2022.

On 28 September 2022 the Agency gave the Applicant notice that it intended to refuse access on the basis of section 25A(1). It advised that it had located more than 550 pages and invited the Applicant to consult on the terms of the request, providing a generic email address.

The Applicant wished to consult with Inspector Matters, however arranged for a phone call with an unnamed FOI Officer. The Applicant said that during this phone call he requested that the Agency provide him with an outline of documents so that he could refine the request, however the office refused this request. The parties continued to liaise however the terms of the request were not redefined.

The Agency concluded that as the scope of the request had not been rescoped as at 21 October 2022, the consultation had come to an end and they made a decision under section 25A(1).

Agency evidence

Inspector Matters gave evidence that:

- Processing the request would occupy a VPS4 assessor 40 hours and represent wages cost of $1920.
- Processing the request would disadvantage other FOI applicants – the Agency was already managing a backlog due to the pandemic and staff vacancies
- The court matter had already been completed and the speeding infringement could not be taken any further

- At the time of the hearing:

  - As at 3 May 2024 there were 3,400 active requests with 2,929 of those overdue
  - Average requests were being finalised 36 weeks after the due date
  - Of the total 38.1 full time equivalent roles, four remained unfilled
  - The Agency had difficulty recruiting

Applicant evidence

The Applicant placed significant reliance on investigations OVIC undertook into the performance of the Agency in September 2021 and October 2022. The September 2021 report recommended that the Agency substantially increase its staffing resources to deal with the backlog caused by the pandemic. The October 2022 report concluded that steps taken by the Agency were inadequate.

Discussion

Obligation to consult in 25A(6)

Written notice – section 25A(6)(a)

There was no dispute that the Agency had given the Applicant written notice, although the Applicant complained that no direct contact details were provided, VCAT found the requirements of 25A(6)(a) were met.

Reasonable opportunity to consult – section 25A(6)(b)

VCAT rejected the Applicant's view that because he was not given the opportunity to consult with Inspector Matters personally, that he was given no opportunity to consult. Instead, VCAT found that because there was discussion between the Applicant and Agency, there was an opportunity to consult that was more than a mere formality.

SM Dea noted that the fact there was complete silence from the Agency for eight months could have fallen short on this requirement, however given the conclusions on 25A(6)(c), this was not taken further.

Provision of information – Section 25A(6)(c)

The Applicant submitted that the Agency ought to have prepared a table of the kind prepared in *Kelly v Department of Treasury and Finance*, however the Agency submitted that they should only have had to provide him with one if they had prepared one already.

SM Dea accepted that Kelly did not create an obligation on agencies to routinely create indexes or undertake sampling, section 25A(6) requires the Agency to provide relevant clarifying information about the whole or part of the request such that modifications can be made so the objection to processing falls away. The manner in which information is provided will depend on the terms of the request.

In this case, SM Dea considered that the Agency should have been able to identify kinds of documents, as well as distil down duplicates and documents the Applicant already held. VCAT gave the example that the prosecution would have prepared a brief which could have been provided to the Applicant to enable them to identify documents. The Agency also could have considered providing information about processing times for different kinds of documents and suggested ways the request could have been refined.

Ultimately SM Dea found that the Agency did not provide information as required by section 25A(6)(c) because no analysis was undertaken beyond identifying the broad categories of documents located and the request for information was refused.

Although concluding that the terms of 25A(6) were not met, SM Dea considered section 25A(1).

Substantial diversion of resources

SM Dea considered that the resources to be considered are an FOI division staffed by adequate staff, this case 40 staff. Having made that finding, she then gave no weight to the Agency's submissions that relied on identifying the available resources as including only the current allocated staff. SM Dea then proceeded to consider the claimed degree of diversion.

SM Dea found that 550 pages was not a large figure and because the Agency had not undertaken further analysis of those pages, there was no evidence that the number of pages justified the time estimate. There was therefore no evidential basis for SM Dea to make a finding about the claimed diversion and so she was therefore not satisfied that processing the request would be a diversion of resources.

Unreasonable diversion of resources

The Agency placed emphasis on how processing this request would unreasonably divert it from other requests given the current backlog and delay. VCAT did not consider that this supported a finding of unreasonableness given that the resources currently allocated to the Agency were found to be inadequate.

The Applicant submitted there was a broader public interest, identified by OVIC, in ensuring a person can access information about them held by government. VCAT accepted that this is an important public interest.

VCAT found that the Agency had not proven it would be an unreasonable diversion of resources.

Orders

VCAT was not satisfied that section 25A(1) applied to the request, the appropriate order was the decision be set aside and the matter be remitted to the Agency to reconsider its decision by processing the request.