

Notice of Decision and Reasons for Decision

Applicant:	'CO3'
Agency:	Bendigo Health Care Group
Decision date:	22 January 2021
Exemptions considered:	Section 25A(1)
Citation:	'CO3' and Bendigo Health Care Group (Freedom of Information) [2021] VICmr 20 (22 January 2021)

FREEDOM OF INFORMATION – medical file – substantial and unreasonable diversion of agency resources from other operations– COVID-19 – consultation requirements under section 25A(6)

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, 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

22 January 2021

Reasons for Decision

Background to review

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

Full medical record – “date of my last FOI request [date] until present”
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 the documents sought 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. By emails dated from [date range], the Applicant corresponded with the Agency, attempting to refine the scope of the request.
5. 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. The Agency’s decision letter sets out the reasons for its decision.

Review

6. The Applicant, via their representative, sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. On [date], OVIC invited the Applicant to consider whether they would like to reconsider refining the terms of their request. The Applicant, via their representative, advised they sought to continue with the review based on their original request terms and did not wish to narrow the scope of documents requested.
9. I have considered all relevant 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.

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. Specifically, section 25A provides:

- (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 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.

14. The Victorian Supreme Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*,¹ 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... 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 FOI request.²
17. 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
18. 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

Consultation requirements under section 25A(6)

19. In accordance with section 25A(6), an agency must notify the applicant of its intention to refuse the 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
20. As noted above, following the Applicant revising the scope of their request to their medical records to a certain date, the Agency notified the Applicant on [date] in accordance with section 25A(6) of its intention to refuse to process the request, 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, namely that the Applicant revise the request to edited documents within a small specific date range.
21. After numerous attempts at narrowing the scope, by email on [date] the Applicant put forward to the Agency that the scope be narrowed to [date] until the date the FOI request was received by the Agency, being [date].
22. As such, 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

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.

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

ground for refusal. I note that while the Applicant did re-scope their original request in the initial stages of the FOI process, they determined not to further narrow the scope of their FOI request once advised of the inability to process the request by the Agency.

Review of the application of section 25A(1)

23. In my review, I am required to first consider whether processing the Applicant's request would involve a substantial diversion of the Agency's resources, and secondly, 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?

24. 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:⁶

...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.

25. In summary, the Agency submits the following in relation to processing the Applicant's most recent, reduced request:

The documents concerned are all held electronically, for the specified time of [five month date range] it was estimated that there were 495 entries that are estimated to equate to 2220 pages.

[the first method contemplated was] The FOI officer could look into the 495 entries and then individually locate and print off each relevant page; [or]

The second method was applied for an exporting sample for [four week date range], which consisted of 314 pages of which 168 pages were considered relevant. A sample from [six week date range], which consisted of 416 pages of which 241 pages that were considered to be relevant. It took approximately 4 hours to extract that relevant information.

...

On top of this, all of the relevant documents would still require an agency officer to review them and consult, which is also a lengthy process.

26. Regarding the capability to currently process the request, the Agency further submits:

As of the [date] [the Agency] has 60 FOI requests

With ongoing staff shortages further signs of decreased capacity are showing through with 2 FOI decisions in November were made after the due notification date, to date in December; 6 decisions have been made after the due notification date.

27. I have considered the Agency's full submissions regarding the practicability and its capability to process the request at this point in time. I acknowledge the Agency's current adapted working arrangements, due to COVID-19, are impacting the Agency's ability to process FOI requests, particularly where the Agency requires access to documents not available in its current remote working environment. However, I also note that the agency has legal obligations under the FOI Act and that these obligations do not disappear or become less important during current remote working arrangements.

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

28. In any event, I accept the Agency's estimate about the number of records and acknowledge the consultation as described would be extensive and time consuming. I consider even if the estimate were dramatically reduced, this would still represent a large number of hours in the context of this single matter and the current staffing and workload experienced by the FOI unit.
29. On the information before me, I am satisfied the time required for the Agency to process this request would involve a substantial diversion of the Agency's resources.
30. Accordingly, I am satisfied the first requirement for section 25A(1) is met.

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

31. 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.⁷

32. In determining 'unreasonableness' for the purposes of section 25A(1), I have had regard to the approach adopted by VCAT, which considered the following factors in determining if a request would involve an unreasonable diversion of an agency's resources:⁸

- (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 rescoped request are sufficiently precise to enable the Agency to locate the documents sought by the Applicant.

- (a) 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 unless it is necessary to refuse access under an exception or exemption in the FOI Act in order to protect 'essential public interests and the private and business affairs of persons in respect of whom information is collected and held'.⁹

In *Mildenhall v Department of Education*,¹⁰ VCAT held:

Section 25A seeks to balance competing interests. There is a public interest in agency not being diverted from its core work through needing to process a very broad-ranging request for documents.

I acknowledge the Applicant's personal interest in seeking access to their medical file and the interest in disclosure of personal medical records.

However, in the current circumstances, I am not satisfied the Applicant's interest in seeking access to the document outweighs the competing public interest in the Agency not being diverted from its core operations in order to process an FOI request of this size. This includes the need for the Agency to balance competing demands in relation to its functions and other

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).

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

operational responsibilities. I consider these factors are somewhat compounded by the current adapted working arrangements with which the Agency is required to comply during the COVID-19 pandemic, but this is not a conclusive factor.

- (b) 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.

Based on the information before me, I accept the estimate of resources and time required for the Agency to process the request in its current terms, means the request is not a reasonably manageable one. As referenced above, I also consider these factors are somewhat compounded by the current adapted working arrangements which I accept would reasonably impact on the resources usually available to Agency for dealing with FOI requests.

- (c) 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.

The intention of the consultation requirement under section 25A(6) is to provide for a reasonable exchange of information and negotiation between an agency and an applicant in relation the terms and scope of the applicant's request.

Having reviewed the exchanges between the Applicant and the Agency in relation to this request, I am satisfied the Agency responded reasonably to the Applicant's request. This included being transparent about the current difficulties due to the adapted working arrangements as a result of COVID-19 and offering the Applicant the option to progress this request, in a narrowed form, once access to the document was possible.

While the Applicant was not obliged to do so, I note the Applicant declined the opportunity to further narrow the scope of their request or explore alternative options for seeking the information sought in the future.

- (d) The statutory time limit for making a decision in this application.

Based on the estimate for the work required to process the request, the amount of consultation required for these documents and the resources available to the Agency to process FOI requests, in particular a request of this size, I am satisfied the Agency would be unable to process the request and make a decision within the statutory timeframe.

While section 21(2) provides for the Agency to seek agreement from the Applicant for an extension of time, I consider the time required for the Agency to process the request, means that, even with an extension of time, the Agency would not be able to process the request within a reasonable timeframe.

33. Having considered the above factors, I am satisfied processing the Applicant's request in its current terms at this point in time would involve an unreasonable diversion of the Agency's resources from its other operations.
34. Accordingly, I am satisfied the second requirement for section 25A(1) is also met.

Conclusion

35. On the information before me, I am satisfied the work involved in the Agency processing the Applicant's request would both substantially and unreasonably divert the resources of the Agency from its other operations.

36. Accordingly, I am satisfied the requirements for refusal to grant access to the document in accordance with the Applicant's request under section 25A(1) are met and the Agency is not required to process the Applicant's request in its current form.
37. Despite my decision on this request, I note it is open to the Applicant to make a new FOI request to the Agency for the information sought. In doing so, the Applicant may wish to reduce the scope of their request by further reducing the time period and/or by requesting information around a specific event or medical attendance.

Review rights

38. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
40. 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.
41. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.¹³

¹¹ Section 50(1)(b).

¹² Section 52(5).

¹³ Sections 50(3F) and (3FA).