

Notice of Decision and Reasons for Decision

Applicant:	'FT9'
Agency:	Hume City Council
Decision date:	7 January 2025
Exemptions considered:	Section 25A(1)
Citation:	'FT9' and Hume City Council (Freedom of Information) [2024] VICmr 67 (7 January 2025)

FREEDOM OF INFORMATION – council documents – work involved in processing the request would 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 is the same as the Agency's decision.

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 under section 25A(1) are met and the Agency is not required to process the Applicant's request.

My reasons for decision follow.

For information about further review rights through the Victorian Civil and Administrative Tribunal (**VCAT**), please refer to the end of this decision.

Penny Eastman
Public Access Deputy Commissioner

7 January 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following clarification with the Agency, the request was clarified to seek access to:
 1. A copy of the Signed Lease Between Hume Council and the Victorian Government for [a location]; - search period [date] to present.
 2. All supporting documentation that supports the data, as reported in HCC21/942, which clearly show where and how these final costs were derived. Details of all costs that were presented as per council report HCC21/942. – search period [date] to present.
 3. A copy of all invoices or documents containing claims or any fees paid, for all costs and expenses for all council officers and staff who attended the National General Assembly [year] held in Canberra [month, year].
 4. Relating to [address] from the [date] in reference to P24753 please provide a copy of any non-compliance notices and other communication in reference to non-permitted activity at the site before the above permit was issued.
 5. Pertaining to training courses and any other tertiary education courses (such as degrees, certificates etc) for [specified Agency officers], please provide copies of all payments or claims including the name of who the payment was paid to and for whom the payment was for since [date].
 6. The contract and/or contracts of engagement between Hume City Council and [named person] since [year].
 7. All invoices or reports that show itemised costs and/or payments made, pertaining to the [an issue with a public amenity] from [date].
 8. Any documents that articulate why works were stopped at [a location]. Key words to assist with the search are Wurundjeri Woi Wurrung geotechnical Earthquake. Date range: [date] to present.
 9. Copy of the Contract of Engagement for [named person] – search period [date] to current
 10. Any compliance/non-compliance documents that relate to [address], such as illegal building, filling, water course and dams. Date range: [date] to current.
 11. All internal and external communication pertaining to [the Applicant] and [a government agency], and a breakdown of all costs incurred by Hume City Council. From the [date] to present.
 - i. Communication to be between Hume Council, [the government agency], legal practitioners, and all [specified Agency officers].
 - ii. Breakdown of all costs = invoices and documents showing payments made (and to whom) for direct costs incurred by Council in relation to the matter including legal costs.
2. 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 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. The Agency's letter invited the Applicant to

consult with the Agency to refine the terms of the request with a view to removing the grounds for refusal.

3. On the same date, the Applicant responded, advising that they did not seek draft documents. However, they declined to refine the terms of the request any further, requesting that the Agency make its decision in order for the Applicant to appeal to VCAT.
4. On [date], the Agency made a decision to refuse to grant access to documents under section 25A(1) as it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered relevant communications and submissions received from the parties.
8. 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.
9. 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.

Informal resolution attempt

10. When making their application for review to OVIC, the Applicant advised they would be willing to reduce their request in certain areas with respect to personal affairs information. The Applicant engaged constructively with OVIC staff during an informal resolution process to specify how the request could be amended to remove certain personal affairs information. This amended scope of the Applicant's request was communicated by OVIC to the Agency. However, the Agency advised that the amended request did not remove the proposed grounds for refusal. Accordingly, I continued with a review of the Agency's decision based on the Applicant's original request scope.

Review of the application of section 25A(1)

11. Section 25A(1) is an exception under the FOI Act that provides an FOI request may be refused in certain circumstances following an agency's consultation with an applicant in accordance with section 25A(6).
12. 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 relate, 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.

...

- (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 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.

13. The Victorian Supreme Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*¹, described the purpose of section 25A(1) as:

¹ [2001] VSCA 246 at [48].

... 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...

14. The Supreme Court of Victoria has held 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 the applicant's FOI requests.²
15. 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.³

Consultation under section 25A(6)

16. 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
17. On [date], the Agency issued a notice under section 25A(6) to the Applicant, providing them with an opportunity to reduce the scope of the request so as to remove the grounds for refusal. The notice provided the Applicant with an opportunity to consult with the Agency to refine the terms, and provided three reasonable suggestions as to how the Applicant could redraw the boundaries of the request to remove the proposed ground for refusal.
18. In their response on the same date, the Applicant refined their original request to remove draft documents, which was not one of the three suggestions put forward by the Agency. The Applicant declined to further narrow the scope of the request; while also making clear to the Agency that it should make its decision to enable the Applicant to make an application to VCAT.
19. Having interpreted the Applicant's response as an unwillingness to undertake further consultation to redraw the boundaries of the request, the Agency issued its section 25A(1) decision to the Applicant on [date].
20. I have reviewed the consultation correspondence between the Agency and the Applicant. I am satisfied the Agency provided the Applicant with an opportunity to consult to refine the terms of the request and provided reasonable suggestions to assist them in reducing the scale of the request.

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

³ 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.

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

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

21. The Agency bears the onus of establishing that its estimate of the resources required to process the request was 'reasonable' in all the circumstances. This will usually require detailed evidence of the estimate, including records of how the agency arrived at the estimate.⁵
22. 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.⁶
23. Factors that may be relevant to determining whether the diversion of resources would be substantial may include the:
 - (a) nature and size of the agency;
 - (b) level of resourcing allocated to FOI processing;
 - (c) number of other FOI requests on hand, and whether requests received are increasing or decreasing; or
 - (d) number of employees who may help process the request, and their other responsibilities.
24. The Agency's consultation letter and decision letter did not provide details regarding the quantity of documents relevant to the request, or the time and staff resources required to process those documents. However, in submissions to OVIC it provided further details about preliminary document searches conducted, and a time estimate required to process the documents. The Agency advised that the results of a preliminary search indicated it would take a minimum of 300 hours just to search for the documents.
25. With respect to its resources, the Agency submits it has 1.8 full-time equivalent staff, and at the time of issuing its section 25A(6) notice, it had 27 FOI requests, in addition to complaints and reviews with OVIC and VCAT. I accept the Agency's submissions in relation to its staff resourcing, which is relatively limited, noting the size of the Agency and that it is not a major government department with a dedicated FOI Unit.
26. I note the terms of the request cover multiple subject matters and time frames, making the request broad and comprehensive in nature. I am satisfied the Agency would need to liaise internally with various business units in order to undertake a thorough search for documents.
27. Having considered the terms of the request and the additional submissions provided by the Agency, 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 request, and identify, assess and undertake any required third party consultation, 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?

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

⁶ *Ibid* at [10].

28. 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

29. 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*,⁸ in which VCAT considered relevant factors when determining if a request involves an unreasonable diversion of an agency’s resources. I consider these factors below in the context of this matter (examples below):

- (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 that the terms of the Applicant’s request are sufficiently precise to enable the Agency to locate the requested documents.

However, given the broad nature of the request, and the number of distinct business units from whom the documents would need to be obtained, I am satisfied the time required for those individuals and the Agency’s FOI officer to undertake document searches and locate relevant documents would likely require more than a reasonable amount of time and, in my view, would go beyond the exercise of reasonable effort.

- (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 held by government agencies, limited only by an exception or exemption in the FOI Act to protect ‘essential public interests’.

On the information before me, I am unable to ascertain if the Applicant has a specific purpose for seeking access to the requested documents. Noting the varied subject matters of the request, I have considered whether the Applicant seeks the documents for accountability and transparency purposes around the expenditure of Council funds. However, even with this interest in mind, I am not satisfied the Applicant’s interest outweighs the competing public interest in the Agency not being diverted from its other local government operations in order to process a request of this size and nature.

- (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.

The Agency estimates it would take approximately 300 hours to search for documents. This estimate did not include the time required to undertake an assessment of each document under the Act, undertake consultations where required, creating edited copies of documents or notifying the Applicant of the decision.

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].

I consider the time estimated by the Agency to be overstated, and do not consider a search for documents would take as long as has been forecasted. However, I remain satisfied that the time required to process the documents, and the limited resources available to the Agency, renders the request not 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.

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.

I note that while the Applicant did refine their original request to remove draft documents, they declined to further narrow the scope of the request, while also making clear to the Agency that it should make its decision to enable the Applicant to appeal to VCAT. I am satisfied this statement by the Applicant demonstrated an unwillingness to engage in redrawing the boundaries of the request, which in turn prompted the Agency to cease consultation and provide the Applicant with a section 25A(1) decision.

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

On the information before me, I am not 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. Nevertheless, I accept the statutory time limit is a barrier to the Agency processing this particular request.

30. Having considered the above factors, I am satisfied any diversion of the Agency's resources would be unreasonable.
31. 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

32. On the information before me, I am satisfied the work involved in the Agency processing the Applicant's request would substantially and unreasonably divert the resources of the Agency from its other operations.
33. Accordingly, I am satisfied the requirements for refusal under section 25A(1) are met and the Agency is not required to process the Applicant's request.
34. Despite my decision, I note it is open to the Applicant to make a new request with a reduced scope.

Applicant's review rights to VCAT

35. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
37. 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.
38. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it is advised the Applicant has applied to VCAT for a review of my decision.¹¹

⁹ Section 50(1)(b).

¹⁰ Section 52(5).

¹¹ Section 50 (3FA).