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21 May 2024

Dr Tim Read MP
Integrity & Oversight Committee
Parliament of Victoria
Parliament House
Victoria 3002

By email: inquiryfoi@parliament.vic.gov.au

Dear Dr Read,

Inquiry into the operation of the *Freedom of Information Act*: Further information on 'substantial and unreasonable' use of resources

On 18 March 2024, I appeared at the public hearing for the Integrity and Oversight Committee's Inquiry into the *Freedom of Information Act 1982* (Vic) (the Victorian FOI Act). During the hearing, I offered to provide the Committee with further information on determining whether an application involves substantial and unreasonable use of resources under section 25A. This offer was accepted by Mr Sean Coley, Committee Manager, on 26 April 2024.

My policy advisers have now prepared the following summary of case law relevant to section 25A, and further factors for determining substantial and unreasonable use of resources from comparable legislation in New South Wales and Tasmania, which I hope will assist the Committee.

Overview of section 25A

As you know, section 25A(1) of the Victorian FOI Act states that an agency or Minister dealing with a request may refuse to grant access to documents without processing the request, if the agency or Minister is satisfied that the work involved in processing would substantially and unreasonably divert the resources of the agency from its other operations, or substantially and unreasonably interfere with the performance of the Minister's functions.[1]

The Victorian FOI Act does not provide any specific test or guidance to determine 'substantially and unreasonably'. Section 25A(2) however requires the agency or Minister to consider the resources that would have to be used:

(a) in identifying, locating or collating the documents within the filing system of the agency or office of the Minister; 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.

While the above is not an exhaustive list,[2] the agency or Minister cannot have regard to:

- any maximum amount, specified in regulations, payable as a charge for processing a request of that kind;
- any reasons that the applicant gives for requesting access; and
- the agency's or Minister's belief as to what the applicant's reasons for requesting access are.[3]

Before an agency or Minister refuses to grant access under section 25A, they must first comply with the requirements in section 25A(6) to:

[1] *Freedom of Information Act 1982* (Vic) s 25A(1).
[2] *McIntosh v Victoria Police* [2008] VCAT 916, [7].
[3] *Freedom of Information Act 1982* (Vic) s 25A(3)-(4).

(a) first give the applicant a written notice–
    (i) stating an intention to refuse access; and
    (ii) identifying an officer of the agency or a member of staff of the Minister who the applicant can consult to re-make the request in a form that would remove the ground for refusal; and
(b) give the applicant a reasonable opportunity to consult the officer or member; and
(c) provide the applicant with any information that would assist the making of the request in such a form as far as is reasonably practicable.

Case Law

The purpose of section 25A is to prevent substantial and unreasonable diversion of an agency or Minister's resources from its other operations by voluminous requests for access to documents.[4] As noted by the Victorian Court of Appeal:

> *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 to which reference has already been made 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.*[5]

If an agency decides to refuse access under section 25A, it bears the onus of proof to establish this exemption.[6] There are three requirements that need to be met before access can be refused under section 25A(1), that:

1. The agency has complied with the requirements in section 25A(6), by:
    a. notifying the applicant of the agency's intention to refuse access, and identifying a contact person;
    b. giving the applicant a reasonable opportunity to consult and re-make the request in a form that would remove the ground for refusal; and
    c. providing the applicant with any information that would assist them to re-form the request, as far as is reasonably practicable;
2. The work involved in processing the request would substantially divert the resources of the agency from its other operations.
3. That the work involved in processing the request would unreasonably divert the resources of the agency from its other operations.[7]

The FOI Act does not specify what constitutes a reasonable opportunity to consult under section 25A(6), and the timeframe will depend on the facts in each case. OVIC's Professional Standard 5.2 requires an agency to take reasonable steps to notify an applicant of the agency's intention to refuse a request within 21 days of receiving a valid request, and to provide the applicant a minimum of 21 days from the date of the agency's notice to respond. The agency or Minister must also explain why the request is too broad and, if possible, offer suggestions and information to help the applicant to re-scope or narrow the request to avoid the ground for refusal.[8]

'Substantially and unreasonably' is not defined and the words are given their ordinary meaning. This does not require overwhelming proof of difficulty and allows some latitude to the agency, as the difficulty of the process can only be estimated, not proven.[9] However, section 25A will only apply in a clear case of substantial and unreasonable diversion from the agency's other operations.[10]

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[4] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [48].
[5] Ibid [48].
[6] *McIntosh v Victoria Police* [2008] VCAT 916, [11].
[7] *Draper v Victoria Police* [2023] VCAT 114, [44]
[8] Office of the Victorian Information Commissioner, 'Part III – Access to documents' (Freedom of Information Guidelines, 27 December 2023) 148, [1.65].
[9] *McIntosh v Victoria Police* [2008] VCAT 916, [21].
[10] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [6]; applied in *Davis v Suburban Rail Loop Authority* [2021] VCAT 627, [48]. 'Other operations' means everything else the agency does: *Chief Commissioner of Police v McIntosh* [2010] VSC 439, [23].

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'Substantial' has been interpreted to mean that the diversion of resources must be more than merely nominal.[11] This factor considers the estimated amount of time needed to fulfil the request at the time the request was lodged,[12] being the resources required to deal with an FOI application (such as the actions listed in section 25A(2)) alongside attending to the agency's other priorities.[13] Factors relevant to determining whether the diversion of resources would be substantial may include the:

- nature and size of the agency;
- level of resourcing allocated to FOI processing;
- number of other FOI requests on hand, and whether requests received are increasing or decreasing; or
- number of employees who may help process the request, and their other responsibilities.[14]

An agency is not obliged to specify exactly how much time and energy would be spent by the agency in processing the request. Estimates are acceptable, as requiring precision would result in the agency having to do the very work that section 25A is designed to prevent.[15] Although precision is not required, the agency must still grapple with the question of what time and resources would reasonably be involved.[16]

Once the agency has determined that the diversion of resources is substantial, it must then determine whether the diversion is also **unreasonable**. In *The Age v CenITex*,[17] VCAT set out the following factors to be considered when deciding if the diversion of an agency's resources would be unreasonable:

- whether the terms of the request offer a sufficiently precise description to allow the agency to locate the documents sought, within a reasonable time and with reasonable effort;
- the public interest in the disclosure of documents relating to the subject matter of the request;
- 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 requests;
- the estimated number of documents covered by the request, the number of pages and the amount of officer time and resulting salary cost;
- whether the agency's initial assessment was reasonable or otherwise, and whether the applicant has taken a co-operative approach in revising the application;
- the statutory time limit under the Act for making a decision;
- the degree of certainty that can be attached to estimates of the time to locate and process the documents, and whether there is a real possibility that the processing time may exceed the estimate;
- whether the applicant is a repeat FOI applicant.[18]

It is not necessary to show that the unreasonableness is overwhelming.[19] There is no threshold number of hours beyond which processing a request becomes a substantial and unreasonable diversion. The circumstances of the particular application are central to the determination, and it is difficult to put significant weight purely on the number of documents or the number of hours involved.[20]

Ultimately, determining whether the diversion of resources would be unreasonable involves balancing the estimated impact on the agency or Minister of processing the request against the objectives of the Victorian FOI Act (that is, to

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[11] *Re A and Department of Human Services* (1998) 13 VAR 235, 247.
[12] As opposed to the resources that the agency might be able to obtain or when vacant established positions are filled: *SRB and SRC and Department of Health, Housing, Local Government and Community Services* [1994] AATA 79 [29]; *McIntosh v Victoria Police* [2010] VCAT 1790, [47]; *Draper v Victoria Police* [2023] VCAT 114, [57].
[13] *McIntosh v Victoria Police* [2010] VCAT 1790, [47].
[14] Office of the Victorian Information Commissioner, 'Part III – Access to documents' (Freedom of Information Guidelines, 27 December 2023) 142 [1.45].
[15] *McIntosh v Victoria Police* [2008] VCAT 916, [10].
[16] Ibid [29].
[17] [2013] VCAT 288.
[18] *The Age Company Pty Ltd v CenITex* [2013] VCAT 288, [43]-[45].
[19] *Re SRB v Department of Health, Housing, Local Government & Community Services* (1994) 19 AAR 178, 187; followed in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1236, [24].
[20] *The Age Company Pty Ltd v CenITex* [2013] VCAT 288, [30]-[42]; *Davis v Department of Health* [2022] VCAT 718, [87].

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extend as far as possible the right of the community to have access to information in the public sector).[21] As the Victorian Court of Appeal notes:

> *The purpose is, as I have said, to balance the object of the Act to give persons access to government information with the need to ensure that scarce resources of agencies are not substantially and unreasonably diverted from their core activities of implementing government policy in order to deal with voluminous requests for information.*[22]

We note that OVIC has published FOI Guidelines on section 25A which may also assist the Committee.

Interstate Legislation

Two Australian jurisdictions – New South Wales and Tasmania – provide additional factors in their legislation in relation to determining substantial and unreasonable use of resources.

Section 60 of the *Government Information (Public Access) Act 2009* (NSW) (NSW GIPA) provides that, in deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency may consider:[23]

- two or more applications (including any previous application) as a single application, if the agency determines that the applications are related and are made by the same applicant (or by persons who are acting in concert),
- the estimated volume of information involved in the request,
- the agency's size and resources, and
- the decision period under section 57 of the NSW GIPA [the required period for deciding applications].

However, the NSW GIPA does not require the agency to consider any agreed extension of time.[24]

Section 60(3B) ultimately requires the agency to determine whether the above considerations outweigh:

- the general public interest in favour of the disclosure of government information; and
- the demonstrable importance of the information to the applicant, including whether the information—
    - is personal information that relates to the applicant, or
    - could assist the applicant in exercising any rights under any Act or law.

We note that the NSW Information and Privacy Commission published a fact sheet on Unreasonable and substantial diversion of agency resources in 2020, that discusses the history and case law on section 60.

Separately, section 19 of the *Right to Information Act 2009* (TAS) also allows public authorities to refuse to provide the requested information where it would 'substantially and unreasonably divert the resources from its other work.' Section 19(1)(c) refers to a list in Schedule 3 of matters that must be considered when assessing if processing an application would result in a substantial and unreasonable diversion of resources. These are:

- the terms of the request, especially whether it is of a global kind or a generally expressed request, and in that regard whether the terms of the request offer a sufficiently precise description to permit the public authority or Minister, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort;
- whether the demonstrable importance of the document or documents to the applicant might be a factor in determining what in the particular case are a reasonable time and a reasonable effort;
- more generally whether the request is a reasonably manageable one, giving due, but not conclusive, regard to the size of the public authority or Minister and the extent of its resources available for dealing with applications;
- the public authority's or Minister's estimate as to the number of sources of information affected by the request, and by extension the volume of information and the amount of officer-time, and the salary cost;

[21] *The Age Company Pty Ltd v CenITex* [2013] VCAT 288, [46]
[22] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [49].
[23] *Government Information (Public Access) Act 2009* (NSW) s 60(3)-(3A).
[24] Ibid s 60(2).

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- the timelines binding the public authority or Minister;
- the degree of certainty that can be attached to the estimate that is made as to sources of information affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time might exceed to some degree the estimate first made;
- the extent to which the applicant has made other applications to the public authority or Minister in respect of the same or similar information or has made other applications across government in respect of the same or similar information, and the extent to which the present application might have been adequately met by those previous applications;
- the outcome of negotiations with the applicant in attempting to refine the application or extend the timeframe for processing the application;
- the extent of the resources available to deal with the specified application.[25]

We note that Ombudsman Tasmania has published external review decisions relating to section 19 on their website which may be of assistance to the Committee.

Conclusion

I would like to thank the Parliament of Victoria's Integrity and Oversight Committee once again for the opportunity to further contribute to this inquiry. **Mr Andrix Lim**, Senior Policy Advisor, would be pleased to discuss any aspect of this letter in further detail, or provide additional information if required. Andrix can be contacted by email at [redacted] or by telephone on [redacted].

Yours faithfully

[redacted]

Fiona McLeay

Board CEO & Commissioner

[25] *Right to Information Act 2009* (TAS) sch 3.