FREEDOM OF INFORMATION COMMISSIONER

FOI in practice

Edition 1

Substantial and unreasonable requests

The right of access under the FOI Act to documents held by government agencies and Ministers is not unrestricted. One qualification, in section 25A which was inserted in 1993, is that an agency or Minister may refuse to process a request that would involve a substantial and unreasonable diversion of the agency's resources or a substantial and unreasonable interference with a Minister's functions. This type of request is commonly known as a 'too voluminous' request, although that term is not used in the FOI Act.[1]

Before a request can be refused on this basis, the applicant must be given an opportunity to consult with the agency or Minister and narrow their request so that it may be processed. There is no 'magic figure' for what will be considered too voluminous - it depends on the facts of each case. The requirements of s 25A are not easily satisfied.[2]

Section 25A also allows an agency or Minister in certain circumstances to refuse to grant access without having identified any or all of the documents covered by a request if it is apparent that all of the documents are exempt. There must either be no obligation to grant access to an edited copy, or it must be apparent that the applicant would not want to have an edited copy (s 25A(5)). This provision raises different issues and is not discussed further in this resource.

What is a voluminous request?

Section 25A(1) provides that an agency or Minister may refuse to grant access without processing a request if satisfied that the work involved:

- in the case of an agency, would substantially and unreasonably divert the agency's resources from its other operations, or
- in the case of a Minister, would substantially and unreasonably interfere with the performance of the Minister's functions.

[1] The term was used in the second reading speech for the 1993 amendments to the FOI Act and is commonly used in Victorian Civil and Administrative Tribunal (VCAT) and court decisions. It is also a commonly used term in other Australian jurisdictions.
[2] *Chief Commissioner of Police v McIntosh* [2010] VSC 439.

The purpose of s 25A in relation to an agency's functions was described in *Secretary, Department of Treasury and Finance v Kelly*[3]:

> … 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.

An agency that decides to refuse access under s 25A(1) bears the onus of establishing that the requirements of the section have been met.[4] The VCAT and the courts will strictly uphold the requirements of s 25A, particularly the consultation requirement under s 25A(6). Section 25A(1) should only be applied to 'a clear case' of substantial and unreasonable diversion.[5]

Steps to take in applying s 25A(1)

There are four steps a decision maker must take in applying s 25A(1):

1. Determine if the request is valid – if not, s 25A(1) cannot apply
2. Assess the request under s 25A(1)
3. Consult the applicant
4. Decide.

Each of these is discussed below.

1. Determine if the request is valid

A decision maker must first determine that an FOI request is valid before considering if s 25A(1) should be applied. The request must meet the requirements of s 17, that is:

- it must be in writing
- it must be accompanied by the application fee (unless waived or reduced for hardship)
- it must provide information reasonably necessary to enable the agency to identify the documents sought.

It is only after a request has been determined to be valid that a decision maker should consider whether s 25A(1) should be applied. A voluminous request differs from an invalid request in that it is clear to the decision maker which documents are sought, but the decision maker is satisfied that processing the request would substantially and unreasonably divert the agency's resources from its other operations (or in the case of a Minister, would substantially and unreasonably interfere with the Minister's functions).

In practice, however, considerations under ss 17 and 25A(1) about the scope of a request overlap and it is never too early to start consulting the applicant in light of the 45 day time limit. If on receipt a request appears to be unclear or too large to be able to be processed (for example, if the request refers to all documents relating to a broad subject), an agency or Minister should promptly contact

[3] [2001] VSCA 246 at [48] per Chernov JA.
[4] As noted in *McIntosh v Victoria Police* [2008] VCAT 916, [11].
[5] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [6] per Ormiston JA.

the applicant to help them clarify their request. Agencies and Ministers have a positive duty to help applicants to make requests that comply with the requirements of the FOI Act (s 17(3)). They can do so by such means as:

- consulting the applicant
- obtaining information from the relevant operational areas about the types of documents that are held in relation to the subject matter
- asking the applicant for more information about what they are actually seeking
- suggesting that duplicate documents, draft documents or documents that are clearly exempt (such as Cabinet submissions and documents covered by a secrecy provision) are excluded from the scope.

The agency or Minister should keep records of any discussions with the applicant and should ask the applicant to confirm the terms of a revised request in writing. Care should be taken to ensure that any revised terms suggested to the applicant will not still be too broad to be processed. Consulting at this early stage will often avoid the need to follow the formal process under s 25A(1).

2. Assess the request

Once the request has been determined to be valid, the agency or Minister may consider if s 25A(1) will apply. The FOI Act specifies certain factors to be taken into account and other factors to be disregarded in estimating the resources that would be needed to process a request. Section 25A(2) states that the resources to be considered include those which would need to be used in:

- identifying, locating or collating the documents in the agency's or Minister's filing systems
- deciding whether to grant, refuse or defer access to the documents or edited copies of the documents, including resources for examining the documents or undertaking consultation
- making copies or edited copies of the documents
- notifying the applicant of an interim or final decision.

The fact that a request covers a large number of documents is not determinative if the documents can be easily identified, collated and assessed.

Sections 25A(3) and 25A(4) state that an agency or Minister must not have regard to:

- any maximum amount which may be charged for processing the request
- any reasons given for making the request, or any belief as to the reasons why the request was made.

The resources to be considered are those the agency or Minister reasonably requires to process the request while attending to other responsibilities.[6] The agency's 'other operations' in s 25A(1)(a) include the processing of other FOI requests.[7]

The agency or Minister is not required to consider obtaining external assistance to process the request, such as by hiring IT consultants to carry out substantial work before electronic documents may be accessed.

---

[6] *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [187] (decision of the Commonwealth Administrative Appeals Tribunal in considering the Commonwealth equivalent of s 25A(1)). This decision was referred to in *The Age Company Pty Ltd v CenITex* [2013] VCAT 288 at [23].
[7] *Chief Commissioner of Police v McIntosh* [2010] VSC 439 at [23]

However, agencies are expected to properly resource the FOI function. The VCAT has stated that s 25A(1) requires consideration of 'the capacity of the agency overall to process the request, not the capacity of the FOI unit of the agency'.[8] An agency or Minister cannot avoid their statutory duty by deliberately withholding resources or deliberately failing to provide proper resources for the FOI function.[9]

If the processing of requests is regularly constrained by the level of resourcing allocated to FOI, the agency or Minister should review the adequacy of the resourcing.

Estimating the resources

It is not necessary to compile a full list of all relevant documents or to calculate exactly how many resources would be needed to process the request. The VCAT observed in *McIntosh v Victoria Police*[10] –

> 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.

The onus is on the agency or Minister to establish that their estimate is reasonable. An accurate estimate can be obtained through sampling a reasonable selection of representative files as an indication of the time and resources that would be required to process the request.

A person with appropriate expertise should assess the sample documents, considering each document briefly as if they were making a decision on access. The assessment should indicate the complexity of the potential decision, that is, it should identify:

- the content of the documents
- the number and range of possible exemptions
- the extent of consultations required and the time needed to obtain all third parties' contact details.

The sample must be reasonably representative and be assessed by an appropriate officer. For example, the VCAT has criticised an estimate based on a random sample of 21 files out of a list of 2600 relevant files, of which only 10 were examined by an inexperienced officer.[11] In another matter, the VCAT did not accept the agency's estimate of 5½ weeks full time work and 5½ weeks part-time, saying the task was 'nowhere near as complicated' as was claimed.[12] In a third case the VCAT referred to the agency's estimate of approximately 55 hours of processing time and concluded that the agency 'had not grappled with the question of what time and resources would reasonably be involved' and that there was 'no credible evidence of a large or unreasonable workload' being generated by the request.[13]

The estimate should also include the time that would be taken for the other steps in processing the request (including those set out in s 25A(2), such as making copies of documents to be released). An anticipated high number of internal inquiries from agency staff due to the sensitive nature of a request has been held to be irrelevant, on the basis that:

---

[8] *McIntosh v Victoria Police* [2008] VCAT 916 at [31]
[9] *Re A and Department of Human Services* (1998) 13 VAR 235 at 247.
[10] *McIntosh v Victoria Police* [2008] VCAT 916 at [10]
[11] See *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 24 at [32], [63].
[12] *Asher v Department of Innovation, Industry and Regional Development (General)* [2005] VCAT 1734.
[13] *McIntosh v Victoria Police* [2008] VCAT 916 at [26-29]

> They are issues which surround any freedom of information application to any government agency. Addressing these concerns is a core function of any FOI office.[14]

Once the estimate of resources has been made, the agency or Minister must be satisfied that the diversion of the agency's resources (or the interference with the Minister's functions) is both substantial and unreasonable.

Whether the diversion of resources would be substantial

"Substantial" has been interpreted to mean that the diversion of resources must be more than merely nominal.[15] Other descriptions have included that the diversion of resources would be considerable, serious or significant.[16]

Each case must be determined on an individual basis. What is substantial for one agency may not be for another. Factors that may be relevant to determining whether the diversion of resources would be substantial include:

- the nature and size of the agency
- the level of resourcing allocated to FOI processing
- the number of other FOI requests on hand in the agency, and whether requests received are increasing or decreasing
- the number of employees who would be able to help process the request, and their other responsibilities.[17]

For example, it may be relevant to consider in the case of a request to a Minister whether the Minister can obtain help from an agency and whether the specialist attention of the Minister or a senior officer is needed. In the case of a request to an agency, it would be relevant to consider whether the work can only be undertaken by one specialist officer who has competing responsibilities.

Whether the diversion of resources would be unreasonable

Determining whether the diversion of resources would be unreasonable involves balancing the predicted impact on the agency or Minister of processing the request against the object of the FOI Act to extend as far as possible the community's right to access to information held by government (s 3(1)). It is not necessary to show that the extent of the unreasonableness is overwhelming.[18] All the facts and circumstances of the particular case should be considered.

---

[14] *McIntosh v Victoria Police* [2008] VCAT 916 at [33]
[15] *Re A and Department of Human Ser*vices (1998) 13 VAR 235 at 247.
[16] J Pizer, *Victorian Administrative Law*, at [FOI.25A.120].
[17] J Pizer, *Victorian Administrative Law*, at [FOI.25A.120].
[18] *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [187]. This decision concerned the equivalent Commonwealth provision.

In the *CenITex* case[19] the VCAT set out factors to be considered in deciding whether the diversion of an agency's resources would be unreasonable:

- Whether the terms of the request are sufficiently precise to allow the agency to locate the documents within a reasonable time and with reasonable effort
- The public interest in disclosure of the documents[20]
- 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 salary cost
- The reasonableness of the agency's initial assessment and whether the applicant had taken a co-operative approach in revising the application[21]
- The 45-day time limit for making a decision
- The degree of certainty that can be attached to the estimates of documents and processing time, and whether there is a real possibility that the processing time may exceed the estimate
- Whether the applicant is a repeat FOI applicant.

In relation to the last factor, more is required than that the person has previously made an FOI request. The NSW Administrative Decisions Tribunal in *Cainfrano*[22] stated that whether the applicant was a repeat applicant was only a possible factor to consider in relation to applications of the same kind and the extent to which previous applications may have adequately met the present application. In the *CenITex* decision[23] which drew on the *Cianfrano* decision, the VCAT commented that the fact that the applicant, a media organisation, was a repeat FOI applicant had 'no bearing on the decision'. Major newspapers could be expected to 'use FOI as part of their investigative journalism toolkit', and members of the Parliamentary opposition also tended to repeatedly use FOI.

In balancing the impact on the agency or Minister of processing the request against the right of the public to access to information, it may also be relevant to consider the steps the agency or Minister has already taken to inform the public about the subject matter of the request.[24] The nature of the agency's activities may also be significant.[25]
Examples of decisions are set out below. While there is no threshold number of hours beyond which processing a request would be upheld as substantial and unreasonable, most of the VCAT

[19] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288 at [43- 45]. A similar approach was followed in *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1550. The decisions drew on a non-exhaustive list of factors set out in the NSW decision of *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137 (which drew in part on the decision of the Victorian Administrative Appeals Tribunal in *Re Borthwick and University of Melbourne* (1985) 1 VAR 33). Another factor considered in the *Cainfrano* decision was the demonstrable importance of the documents to the applicant.
[20] The *CenITex* decision placed particular importance on the public interest in the transparency of gift giving to government instrumentalities, the subject matter of the request.
[21] See also *Re A v Department of Human Services* (1998) VAR 235 at 246, where it was stated that the applicant's refusal to limit the ambit of a broad request in any way was relevant to unreasonableness.
[22] *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137 at [62].
[23] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288 at [45].
[24] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288 at [46], citing J Pizer in *Victorian Administrative Law* at [FOI.25A.140].
[25] For example, in *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137, the NSW Administrative Decisions Tribunal (O'Connor DCJ) stated that the NSW Premier's Department, which could 'be expected to have substantial bodies of documents that involve important areas of government activity', should not be given the 'degree of liberality … that might be appropriate to a very small statutory body with a small staff complement, and consequently a very limited capacity to deal with FOI requests of scale' [60].

decisions that have upheld s 25A(1) decisions are in the hundreds of hours. Each decision was made in the context of the size of the agency and its available resources.

- A decision to refuse to process two applications that would include examining more than 1 million emails from a 33 month period was upheld. The agency had not historically had a large number of FOI requests and its general operations did not appear to warrant more than one FOI officer.[26]
- A decision was upheld based on an estimate of the time of a departmental FOI Unit of approximately 170 hours, substantial time of a school principal and some time of other areas of the department.[27] The request was very detailed and similar in scope to the applicant's previous request arising from the same circumstances.
- A decision was upheld based on an estimate that processing approximately 1000 pages of printed e-mails would take 160 hours.[28]
- A decision was upheld based on a VCAT estimate of 90 hours rather than the 400 hours claimed by the agency. The VCAT commented that the unreasonableness was 'closely related to the resources' the agency had allocated over many years to dealing with the applicant's many requests, and suggested that 90 hours was below the 'low end' of what would generally be considered unreasonable.[29] The VCAT was satisfied in the particular circumstances of the case that the diversion of resources to process the request was both substantial and unreasonable.

The following are examples of the Freedom of Information Commissioner decisions on review -

- An agency had determined that processing a request would be a substantial and unreasonable diversion of its resources. Whilst the agency had given the applicant the opportunity to consult, the applicant did not co-operate. The FOI Commissioner accepted the agency's estimate of up to 90 hours. Other factors included the resources available to the agency where only one officer was available to process the request but that officer was also required to undertake other significant duties. There was no wider public interest in disclosure. In addition, the Applicant had previously made 45 requests to the Agency over a number of years. The FOI Commissioner was satisfied that processing the request would be a substantial and unreasonable diversion of the agency's resources.
- An agency determined that processing a request would be a substantial and unreasonable diversion of its resources after the applicant had refused to rescope the request during consultation. The agency estimated contents of hardcopy files of over 1000 pages. Separate email searches would also be necessary. The estimated time to process was 3 months. While the Agency FOI unit had 6 staff, the number of other requests at the time of this request was significant and 16 were overdue. The wider public interest was not promoted by disclosure. The FOI Commissioner was satisfied that processing the request would be a substantial and unreasonable diversion of the Agency's resources.

Multiple requests

In determining if s 25A(1) applies, multiple requests may in certain circumstances be characterised as a single request.[30]

[26] *The Age Company Pty Ltd v CenITex (General)* [2012] VCAT 1523
[27] *AB v Department of Education (General)* [2012] VCAT 1233.
[28] *Smeaton v Victorian WorkCover Authority (General)* [2012] VCAT 1236
[29] *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550
[30] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246.

There must be a clear connection between the requests, evidenced by such factors as:

- whether the multiple requests are made by or on behalf of the same person
- whether the multiple requests seek documents that concern the same subject matter
- whether the requests were lodged at or about the same time
- whether to do otherwise would be to allow the application and operation intended by s 25A(1) to be evaded (that is, to overcome the mischief that occurs when an agency's resources are substantially and unreasonably diverted from its core operations).[31]

The list of factors is not exhaustive, and not all of them need to exist to enable the requests to be treated as one for the purposes of s 25A(1).

A clear example of where multiple requests could be treated as a single request is where a series of requests lodged at the same time relate to the same subject matter in different time periods (such as over consecutive months or years).

Where multiple requests from different applicants are treated as a single request, the agency or Minister must follow the request consultation process with each applicant.

Partial requests

An agency or Minister cannot apply s 25A(1) to only part of a request while processing the rest of the request.[32]

If the request comprises several parts, it would be helpful to advise the applicant the parts that would be able to be processed, so that the applicant might delete the parts that would otherwise bring s 25A(1) into operation. The applicant may later lodge new requests on the other matters (although a series of requests lodged close in time may be treated as a single request, as discussed above).

3. Consult the applicant

An agency or Minister cannot decide to refuse a request under s 25A(1) without first giving the applicant the opportunity to narrow their request to remove the ground for refusal. Under s 25A(6), the agency or Minister must:

- give the applicant a written notice:
  - stating an intention to refuse access
  - inviting the applicant to consult with an identified agency officer or member of the Minister's staff (usually the FOI officer dealing with the request) with a view to making the request in a form that would be able to be processed
- give the applicant a reasonable opportunity to consult
- as far as is reasonably practicable, give the applicant any information or suggestions that would assist them to make a reasonable request.

[31] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [48] per Chernov JA. The applicant in that case made 321 requests, including 54 identical requests to each of five departments. All requests were transferred to a single department for processing.
[32] *XYZ v Victoria Police (General)* [2007] VCAT 1686.

The 45 day statutory processing time is suspended from the date the applicant is given the notice of intention not to process the request under s 25A(6) until the date the applicant confirms or alters the request (s 25A(7)). For this reason it is important to give the applicant a notice under s 25A(6) as soon as possible after a request is received in order to allow sufficient time to process a revised request.

A reasonable opportunity to consult

The FOI Act does not specify what constitutes a reasonable opportunity to consult. The timeframe will depend on the facts in each case. Usually 28 days should be sufficient, but sometimes a longer period would be reasonable (for example, if the agency knows the applicant is away for several weeks).

Assisting the applicant to revise the request

The agency or Minister should explain why the request is too broad and if possible offer suggestions and information to help the applicant to narrow the request to avoid the ground for refusal under s 25A(1). This could include:

- giving the applicant information about the types or classes of documents the agency or Minister holds in relation to the subject matter, or information about how records are made and stored in the agency or Minister's office
- asking the applicant for more information about the incident or subject matter that interests them, and suggesting specific documents or types of documents that are likely to be of interest
- making suggestions as to how the request could be narrowed (for example, by reducing the time period, reducing the categories of documents and/or eliminating material that involves third parties). Sometimes getting the applicant to discuss their request with a staff member from the relevant operational area may help them to identify the documents they want and refine their request accordingly.

An agency or Minister is not required to give the applicant lists of all relevant documents, but simply to provide enough information to allow the applicant to make an informed request that can be processed.

The agency or Minister should keep records of their efforts to help the applicant and the applicant's responses to those efforts.

4. Decide

If the applicant does not respond when given a reasonable opportunity to do so, the agency or Minister can make a decision to refuse access under s 25A(1). A notice of decision and statement of reasons under s 27 must be given to the applicant. The notice should include:

- a description of the estimated number and types of documents covered by the request, including an estimate of the number of pages or other description of size (such as hours of audio visual recordings)
- a description of the agency's or Minister's efforts to help the applicant revise their request, and any response from the applicant

- the reasons why the request is considered a substantial and unreasonable diversion of the agency's resources or a substantial and unreasonable interference with the Minister's functions, including the estimate of the resources that would be involved in each of the processing steps and an indication of the complexity of the decision
- details of the applicant's review rights.

If the request for access is sufficiently narrowed during the consultation process so that it is no longer considered a substantial and unreasonable diversion of agency resources (or interference with a Minister's functions), the agency or Minister must process the request. The agency or Minister should confirm this in writing to the applicant and advise them of the new timeframe for processing the request, taking into account the consultation period during which the 45 day timeframe for processing the request was suspended.