Office of the Information Commissioner Webinar on Substantial and Unreasonable Diversion of Resources

Key Case Summaries

***Smeaton v Victorian WorkCover Authority* (General) [2012] VCAT 1550** (link)

Discussing the application of section 25A of the *Freedom of Information Act 1982* (Vic), which is cast in similar terms to Queensland's refusal deal provisions.

The Justice referred to and applied the following:

- 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.[1]

- The resources of the agency referred to in s 24(1)(a) must be the resources which the respondent had at the time the request was lodged or had as at the date of the hearing. It cannot mean resources which the respondent might be able to obtain or even resources constituted by the filling of establishment positions. It also cannot mean the whole of the resources of a large Department of State. To find this would make the section meaningless. We consider it means the resources reasonably required to deal with an FOI application consistent with attendance to other priorities.[2]

- In administrative review is not necessary to show ... that the extent of the unreasonableness is overwhelming. It is this tribunal to weigh up the considerations for and against the situation and to form a balanced judgement of reasonableness, based on objective evidence.[3]

Factors considered:

- Whether the terms of the request offers a sufficiently precise description to permit WorkCover, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort.

- 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 Department's estimate as the number of documents affected by the request, and by extension the number of pages and the amount of officer time, and the salary cost.

- The reasonableness or otherwise of the Department's initial assessment and whether Mr Smeaton has taken a co-operative approach in redrawing the boundaries of the application.

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[1] *McIntosh v Victoria Police (General)* 2008 VCAT 916 (16 May 2008)
[2] Re *SRB and Department of Health, Housing, Local Government and Community Services* 1994 AATA 79
[3] Ibid

- The 45-day statutory time limit for making a decision in this application.

- The degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made.

The Justice also considered a) that the applicant was a repeat applicant to WorkCover and b) the public interest in disclosure of documents relating to the subject matter of the request. **Neither of these are relevant considerations when applying section 41 of the RTI Act.**

Mathews and University of Queensland **(5 December 2011)** (link)

During the consultation process the applicant demanded that UQ provide him with the unique identifier for each file, from which he would then select the ones he wished to include in his revised application. The agency refused to provide them as they would add no value, not being indicative of the contents; UQ instead provided additional descriptive information in an attempt to assist.

At external review OIC stated:

- I do not accept that UQ's refusal to accede to the applicant's request during consultation for 'unique identifiers' in any way invalidates its decision. An agency is, as noted, under an obligation to give an applicant information that would help the applicant to make an application capable of being processed without diverting resources within the meaning of section 60.

- Importantly, the obligation imposed by section 61(1)(c) is only expressed to extend to what is 'reasonably practicable', and furthermore, only requires provision of information that would assist an applicant to reframe the scope of an application.

- In this case, UQ's RTI and Privacy Officer clearly advised the applicant that he could not see how provision of a mere 'identifier' such as a basic file number would have allowed the applicant to comprehend the scope and nature of information contained within such file at all, or at least, to a level any better than the information actually supplied by UQ (together with that which must have been known to the applicant given his prior access), so as to permit him to meaningfully narrow the access application as envisaged by sections 60 and 61 of the IP Act.

- This is a view with which, in the circumstances of this case, I agree. I cannot see how supply of file numbers could have enabled the applicant to reframe the scope of his application. I consider UQ was under no obligation to supply 'unique identifiers' as part of the consultation process mandated by section 61 of the IP Act.

- Accordingly, I am satisfied UQ adequately discharged its obligation to provide information under section 61, and do not consider it acted in 'bad faith' in the manner in which it consulted with the applicant in relation to the application.

Middleton and Building Services Authority **(24 December 2010)** (link)

This case was notable as the applicant indicated to BSA that BSA could do a database search for the complainant details, export to excel and perform a mail merge for the letters to the complainants. The applicant added '*For your convenience, I have included a letter than (sic) can be sent with your letter. Understandably, not all those contacted will respond.*'

On external review, OIC noted:

- The applicant also points to BSA's response in relation to a previous application as evidence that BSA can reasonably process her application. On this point I note that the relevant considerations for determining whether BSA can refuse to deal with the Changed Application are set out above. The applicant's submission is not relevant to the issues at hand.

- The applicant also dismisses BSA's efforts to explain the steps it takes to ensure those consulted receive the documents intended for them, including, for example, sending the documents by registered post and attempting to find current addresses for recipients to reduce the incidence of mail being accessed by unintended recipients. BSA's processes, as described, are appropriate and commendable.

- I accept BSA's submissions at paragraph 26 above regarding the time involved in processing the application. In reaching its estimations, BSA has appropriately had regard to data it has previously collected regarding time taken for specific tasks and has used this to inform its estimates.

- Processing this application involves a large volume of documents in relation to which significant consultation would need to be undertaken. Locating and preparing the documents alone is quite a substantial task. As the documents contain individual's personal information, decision-makers would need to check the documents carefully and have them redacted. The redactions would need to be checked. In view of the number and type of documents involved, the administrative processes needed to identify and deal with those documents and the extensive consultation required, I am satisfied that BSA's estimate of the resources and time required is quite realistic.