REFUSING TO PROCESS VOLUMINOUS REQUESTS: CONTRARY TO THE SPIRIT OF FREEDOM OF INFORMATION?†

BRUCE CHEN*

The power of Victorian government agencies to refuse to process voluminous Freedom of Information ('FOI') requests is contained in s 25A(1) of the Freedom of Information Act 1982 *(Vic). During the initial years of operation, it was claimed that this power would not be 'anti-democratic', 'anti-open government' or 'otherwise contrary to the spirit of FOI', given the existence of adequate safeguards and so long as agencies upheld their duties in practice. This article examines whether that has proven to be the case nearly two decades on from the provision's introduction in 1993. It concludes that despite several conceptual difficulties, s 25A(1) has its rightful place in the FOI statutory regime.*

I INTRODUCTION

> It may be said that the fact that an agency may refuse to process a FOI request appears to sit uncomfortably with the fact that one of the main aims of the FOI Acts is to promote 'open government' by fostering government accountability. 'Open government', however, is a relative concept. … [The power] of refusal to process contains inbuilt safeguards to ensure that an agency does not unjustifiably and unreasonably slam the bureaucratic door in an applicant's face. … So long as the duties imposed on agencies are treated seriously and sensibly in practice, there is no reason why an agency's refusal to process a request should be stigmatised as anti-democratic, anti-open government or otherwise contrary to the spirit of freedom of information.[1]

The above commentary defends the wisdom of the Victorian State Parliament for bestowing upon government agencies a power of refusal to process voluminous FOI requests. This power is contained in s 25A(1) of the *Freedom of Information Act 1982* (Vic) ('*Act*'). That provision relevantly states that an agency, in '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

† All references to legislation and case law in this article are as at 14 August 2011, unless otherwise stated.

* Australian Lawyer, admitted in the State of Victoria; LLM Candidate (International and Comparative Law), Monash University. The author would like to express his gratitude to both Associate Professor Moira Paterson and the anonymous reviewer for their insightful comments on earlier drafts of this article.

1 Jason Pizer, 'Refusal to Process a Freedom of Information Request: A Practitioner's Guide' (1998) 87 *Canberra Bulletin of Public Administration* 116, 123.

undertaken', if it is 'satisfied that the work involved in processing the request … would substantially and unreasonably divert the resources of the agency from its other operations …'[2]

Nearly two decades have passed since the introduction of s 25A(1) in 1993. Accordingly, it is timely to reflect on whether it has proven contrary to the spirit of FOI in practice. First, this article will examine the legislative history of s 25A(1). Second, it will reflect on how the provision was initially received in the existing scholarship, of which there is little. Third, state and Commonwealth reviews of the respective FOI Acts will be considered as they relate to the power of refusal to process, as well as recent interstate developments. Fourth, this article will look at relevant Victorian FOI guidelines for agency staff. Fifth, it will analyse the Victorian and Commonwealth jurisprudence to see how courts and tribunals have handled s 25A(1) claims. Sixth, it will consider statutory obligations on agencies to provide applicants with a reasonable opportunity to consult. Finally, a statistical analysis of s 25A(1) claims will be conducted in order to ascertain any historical trends in its use. Ultimately, this article will conclude that an appropriate balance has been struck.

A number of topics which at first glance appear to be associated with voluminous FOI requests fall outside the scope of this article. For example, this article is not concerned with the operation of s 25A(5).[3] That subsection provides a separate right of refusal where it is apparent that a FOI request relates completely to exempt documents.[4] Moreover, voluminous requests should be distinguished from requests which lack sufficient clarity.[5] That issue is addressed by s 17(2) of the *Act*.[6] Finally, this article is not concerned with the topic of vexatious FOI

2 *Freedom of Information Act 1982* (Vic) s 25A(1)(a).

3 *Freedom of Information Act 1982* (Vic) s 25A(5) provides:

> An agency … may refuse to grant access to the documents in accordance with the request without having identified any or all of the documents to which the request relates and without specifying, in respect of each document, the provision or provisions of this Act under which that document is claimed to be an exempt document if —
>
> (a) it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents; and
>
> (b) either —
>
> (i) it is apparent from the nature of the documents as so described that no obligation would arise under section 25 in relation to any of those documents to grant access to an edited copy of the document; or
>
> (ii) it is apparent, from the request or as a result of consultation by the agency … with the person making the request, that the person would not wish to have access to an edited copy of the document.

4 See *Victorian Casino and Gaming Authority v Hulls* [1998] 4 VR 718, 726 (Phillips JA, Brooking and Batt JJA concurring); see also *Knight v Corrections Victoria* [2010] VSC 338, [32] (Bell J).

5 See, eg, *O'Brien v Department of Justice* [2010] VCAT 1379, [20] (Macnamara D-P); *McIntosh v Department of Justice* [2009] VCAT 92, [46], [48] (Ross V-P); Cf *Re Borthwick and University of Melbourne* (1985) 1 VAR 33.

6 Section 17(2) provides: 'A request shall provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency … to identify the document'.

applicants. While s 25A(1) may address that issue indirectly,[7] the provision was not specifically drafted for that purpose.[8]

II LEGISLATIVE BACKGROUND

Section 25A was inserted by the *Freedom of Information (Amendment) Act 1993* (Vic)[9] some 11 years after the *Act* was first enacted. The purpose of the *Act* had been to further the concept of 'open government' and to allow for a more meaningful and informed participation by citizens in a democratic society. The *Act*'s objects clause reflects this purpose. It provides that the *Act* is to 'extend as far as possible' the right to access to information held by government authorities,[10] by creating 'a general right of access to information'.[11] This right is meant to be limited only by necessary exceptions and exemptions.[12] Voluminous requests are one such exception.

A *The Legal and Constitutional Committee*

The introduction of s 25A can be attributed to a 1988 inquiry into the operation of the *Act*, conducted by the Legal and Constitutional Committee of the Parliament of Victoria. The Committee's terms of reference included the examination of 'problems posed by voluminous and expensive applications and in particular whether limits need[ed] to be placed on such applications'.[13] In its final report, the Committee noted that the *Act* (unlike its New South Wales and Commonwealth equivalents)[14] did not 'provide a power which would enable agencies to refuse unreasonably large requests'.[15] Thus, so long as an applicant could 'identify the documents sought with reasonable precision',[16] as required by the *Act*,[17] there was 'no limit to the potential scope of a request'.[18]

7 Amanda Green, 'Vexatious Applications under FOI' (2004) 41 *Australian Institute of Administrative Law Forum* 41, 42.

8 See Legal and Constitutional Committee of the Parliament of Victoria, *Thirty-Eighth Report to the Parliament: Report upon Freedom of Information in Victoria* (1989) 135–6 [8.1]–[8.8]; 'Recent Developments: Victorian Government Responds to Legal and Constitutional Committee Report' (1990) 29 *Freedom of Information Review* 62, 63; see also s 24A of the *Act* regarding 'repeated requests'.

9 See *Amendment Act* s 9.

10 *Freedom of Information Act 1982* (Vic) s 3(1).

11 Ibid s 3(1)(b).

12 Ibid.

13 Legal and Constitutional Committee of the Parliament of Victoria, above n 8, 1 [1.1].

14 See *Freedom of Information Act 1982* (Cth) s 24, since amended by the *Freedom of Information Amendment (Reform) Act 2010* (Cth) sch 6 item 32; *Freedom of Information Act 1989* (NSW) s 25, since replaced by *Government Information (Public Access) Act 2009* (NSW) s 60.

15 Legal and Constitutional Committee of the Parliament of Victoria, above n 8, 46 [5.5].

16 Ibid.

17 See *Freedom of Information Act 1982* (Vic) s 17(2).

18 Legal and Constitutional Committee of the Parliament of Victoria, above n 8, 46 [5.5].

The Committee found that submissions to the inquiry on the issue were 'evenly divided'.[19] The State government, for instance, favoured the introduction of an exception similar to that under the *Freedom of Information Act 1982* (Cth) ('*Commonwealth Act*').[20] On the other hand, the Committee acknowledged there was resistance to such a development. As they understood it, the opposing submissions could be placed in three categories of argument: (1) the phrase 'voluminous request' is subjective in nature, would likely be applied inconsistently and was open to abuse by agencies; (2) the provision would enable refusal of access to documents which are not otherwise exempt; and (3) the issue was sufficiently dealt with under existing legislation.[21]

Although the Committee found that 'only a small minority' of FOI requests were voluminous, it nevertheless accepted that 'even a few such requests can cause enormous disruption to the work of government agencies and can adversely affect their capacity to carry out their primary functions'.[22] Introducing a power of refusal was therefore 'in the interests of good administration'.[23] The Committee recommended a new provision be modeled on s 24[24] of the *Commonwealth Act*.[25] Seeking to allay fears over abuse of the provision, the Committee expressed the view that, when 'applied properly', the provision contained a sufficiently 'stringent test' (the need for a 'substantial' and 'unreasonable' diversion) such that agencies would 'rarely' have occasion for its exercise.[26]

B *Victorian Parliament*

In 1993, the State government tabled the Freedom of Information (Amendment) Bill ('Amendment Bill') which, amongst other things, sought to insert the new s 25A. In the Second Reading Speech, Minister Haddon Storey explained that the purposes of the Amendment Bill included curbing 'unreasonable demands on agency resources' and introducing 'administrative efficiencies'.[27] Section 25A(1) made no reference to the phrase, 'voluminous requests'. However, the Second Reading Speech left no doubt that it was intended to address that exact issue. During the speech, Minister Storey cited one example of an applicant who had purportedly abused the spirit of the *Act* by lodging 'a request relating to a mining group, which involved more than 2000 documents in some 250 files'.[28]

19 Ibid 47 [5.8].

20 Ibid 47 [5.7].

21 Ibid 48–9 [5.12]–[5.17].

22 Ibid 49 [5.18].

23 Ibid 50 [5.19].

24 Section 24 has since been amended by *Freedom of Information Amendment (Reform) Act 2010* (Cth) sch 6 item 32, although the new s 24 is 'intended to have the same scope', with the qualification that it may now be invoked 'for the purposes of two or more applications seeking access to the same documents or to documents where the subject matter is substantially the same': see Revised Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2010 (Cth) 56–7.

25 Legal and Constitutional Committee of the Parliament of Victoria, above n 8, Recommendation 11.

26 Ibid 50 [5.19]–[5.20].

27 Victoria, *Parliamentary Debates*, Legislative Council, 20 May 1993, 1148 (Haddon Storey).

28 Ibid 1149.

The tabling of the Amendment Bill invoked intense and extensive debate in Parliament, reproduced in about 40 pages of Hansard.[29] It was said that the Amendment Bill was 'probably the most deceptive that has ever been brought to parliament', since 'the Bill [took] away the right of the community to access information'.[30] It was described as making a 'mockery' of FOI and its purpose of enhancing 'open government'.[31] However, closer examination reveals that the criticism was overwhelmingly directed at measures unrelated to s 25A. They included the increase of upfront application fees for FOI requests,[32] removal of a $100 ceiling cap for costs payable by applicants[33] and extension of the 'cabinet documents' exemption.[34] Such criticisms in Parliament reflected concerns expressed by the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria.[35] They too were of the view that the provisions of the Amendment Bill constituted a 'reduction in rights'.[36] Whether or not 'the reduction [was] undue' was left to Parliament to decide.[37] None of the Committee's concerns were addressed at measures relating to voluminous requests. The Amendment Bill was ultimately assented to on 8 June 1993.

III EXISTING SCHOLARSHIP ON THE PROVISION'S OPERATION

There is a dearth of literature on the power of refusal to process voluminous requests and its initial reception in Victoria and the Commonwealth. Only two exceptions appear to exist. Upon passing of the Amendment Bill, academic Peter Bayne provided a brief outline of the contents of that Bill.[38] Tentatively, he said whilst 'there is merit in controlling vexatious requests that are directed to disrupting agency activity, [s 25A(1)] has the potential to limit the Act's effectiveness'.[39] Bayne may have believed this to be apparent from the provision itself, for he went no further to explain how it might be so. Also, it should be recalled that contrary to Bayne's comment, s 25A(1) is not specifically directed at vexatious requests.

The power of refusal to process has been the subject of further analysis by solicitor and barrister Jason Pizer.[40] As can be seen from the opening passage of this article, Pizer expressed no objection in principle to the power

29 Ibid 1358–1400.

30 Victoria, *Parliamentary Debates*, Legislative Council, 26 May 1993, 1359 (Barry T Pullen).

31 Ibid 1365 (Jean McLean).

32 *Amendment Act* s 6.

33 Ibid s 7(2), which repealed *Freedom of Information Act 1982* (Vic) s 22(1)(j).

34 Ibid s 12.

35 Scrutiny of Acts and Regulations Committee, *Alert Digest*, No 9 of 1993, 19 May 1993.

36 Ibid.

37 Ibid.

38 Peter Bayne, 'Freedom of Information' (1993) 1 *Australian Journal of Administrative Law* 51.

39 Ibid 51.

40 See Pizer, above n 1; Jason Pizer, 'Recent Developments in FOI in Victoria' (1999) 6 *Australian Journal of Administrative Law* 85; see also Jason Pizer, Eloise Dias and Alistair Pound, Lawbook Co, *Victorian Administrative Law* (at 2-2741–2-2755) ¶FOI.25A.20–FOI.25A.400.

contained in s 25A(1). This was because adequate safeguards were in place to prevent its abuse.[41] In that respect, Pizer seems to be referring to: (1) the need for the agency to 'estimate the resources required to process the request and then consider the impact that processing the request in accordance with that estimate would have on its resources'; and (2) the need for the agency to give the applicant a 'reasonable opportunity of consultation' before refusing to process the voluminous request.[42] It should also be noted in the context of s 25A(1), that the *Act* provides a right of complaint to the Ombudsman pursuant to s 25A(8), as well as a right of review by VCAT pursuant to s 25A(9) or s 50(2)(a).[43] Such measures, it could also be said, amount to safeguards in the power's exercise.

IV SUBSEQUENT REVIEWS AND DEVELOPMENTS

Both the Commonwealth and Victorian governments have conducted reviews of their respective FOI Acts. These reviews will now be considered, relevantly, where an examination of the operation of the voluminous requests provisions has taken place.

A *Australian Law Reform Commission Review*

The predominant review of the *Commonwealth Act* was conducted by the Australian Law Reform Commission ('ALRC') which published its report in 1995.[44] It found that the power of refusal to process 'is a powerful one and should only be used as a last resort' after making 'every attempt to assist' the applicant in narrowing down their request.[45] This obligation already existed under s 24 of the *Commonwealth Act*. It provided that an agency shall not refuse to process a voluminous request without first giving the applicant 'a reasonable opportunity so to consult'.[46]

41 Pizer, above n 1, 123.

42 Ibid 122.

43 The Victorian Parliament has now passed the *Freedom of Information Amendment (Freedom of Information Commissioner) Act 2012* ('*FOI Commissioner Act*'). This Act was assented to on 6 March 2012. At the time of publication, the *FOI Commissioner Act* has yet to come into operation. The main purpose of this Act is to create the new position of FOI Commissioner, bringing it in line with Commonwealth and certain interstate developments. Relevantly, the *FOI Commissioner Act* repeals the Ombudsman complaint mechanism under s 25A(8) and (9) of the *Freedom of Information Act 1982* (Vic): see s 9. It has been replaced by a new review regime: see *FOI Commissioner Act* ss 13 and 15. Generally, an applicant will initially be required to apply to the FOI Commissioner pursuant to s 49A(1)(a), for review of a decision by an agency to refuse to process a voluminous request. An applicant has a further right of review to VCAT under s 50(1) in instances where the FOI Commissioner upholds the agency's decision: see *FOI Commissioner Act* s 15(2), which substitutes s 50(2) of the *Freedom of Information Act 1982* (Vic).

44 Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77 (1995) ('*Open Government Report*').

45 Ibid [7.14].

46 *Freedom of Information Act 1982* (Cth) s 24(6)(d) (as at the time of the *Open Government Report*).

The ALRC recommended that s 24 be redrafted to 'emphasise the importance' of agency consultation, so as to have a symbolic and educative effect on agency staff.[47] This has since occurred with the passing of the *Freedom of Information Amendment (Reform) Act 2010* (Cth).[48] The entirety of the consultation process with applicants is now set out in s 24AB,[49] separate from the power of refusal itself.[50] In addition, agency staff are now explicitly directed to provide the applicant with any information that would assist with revising the request.[51]

Returning to the ALRC report, the Commission also sounded a warning that agencies should not rely on the power of refusal to process simply because 'their information management systems are poorly organised and documents take an unusually long time to identify and retrieve'.[52] However, the ALRC did not present any evidence that this was taking place.

B *Victorian Ombudsman Review*

In Victoria, the *Act* was reviewed by the Ombudsman of Victoria, which culminated in a report published in June 2006.[53] According to the report, complaints received and investigated by the Ombudsman about s 25A(1) claims were 'small' in number.[54] However, he found that in some instances, there was 'little or no justification' provided by agencies for such claims.[55] The Ombudsman reportedly came across examples of agencies seeking clarification about the scope of purportedly voluminous requests, without any evidence that those requests 'could not reasonably be answered'.[56] Moreover, in 'many cases' there had been a failure to give 'proper assistance' to applicants during consultations.[57] Such consultations 'mostly appeared perfunctory'.[58] Finally, the Ombudsman remarked that the files he examined 'disclosed examples of needless delay' by agencies, in raising objections about purportedly voluminous requests.[59] It was said that the circumstances of some of those cases suggested that the objections were 'merely a tactic to delay the response', whilst remaining within the response timeframes under the *Act*.[60]

47 *Open Government Report*, above n 44, Recommendation 32.

48 See *Freedom of Information Amendment (Reform) Act 2010* (Cth) sch 6 item 32.

49 Which has been retitled a 'request consultation process'.

50 *Freedom of Information Act 1982* (Cth) s 24 (read with s 24AA). A substantial and unreasonable diversion of agency resources is now labelled a 'practical refusal reason' under s 24AA.

51 *Freedom of Information Act 1982* (Cth) s 24AB(4)(b).

52 *Open Government Report*, above n 44, [7.14].

53 Ombudsman Victoria, 'Review of the Freedom of Information Act: Report of Ombudsman Victoria' (Report, Victorian Government, 2006).

54 Ibid 63.

55 Ibid 5.

56 Ibid 26.

57 Ibid 5.

58 Ibid 26.

59 Ibid 27–8; see also ibid 30, 'Case 7'.

60 Ibid 28.

In the report's final recommendations, the Ombudsman reaffirmed the significance of the obligation to assist applicants with amending their otherwise voluminous requests.[61] He recommended that agencies provide particular information, 'such as a fair indication of the documents or classes of documents [they hold] that may relate to the subject of the request or of the type of information recorded by the [agencies] and the way in which it is kept'.[62] Aside from this, the Ombudsman's report went no further to remedy the operation of s 25A(1). No legislative changes were recommended. Thus, while a number of operational issues were identified, the Ombudsman was not so moved to reach a finding that s 25A(1) ought to be amended or reconsidered.

C *Interstate Developments*

It is appropriate to note here that significant FOI reforms have taken place interstate, particularly in Queensland, New South Wales and Tasmania. In those jurisdictions, 'root and branch' reviews of their respective FOI Acts have resulted in a recasting of those statutory regimes. The thrust of recently enacted legislation has shifted towards a proactive release of information by agencies, thereby seeking to relegate individual FOI requests to matters of last resort.[63] This reflects what is known as the 'push' model, as compared to the 'pull' model which remains in place in Victoria.[64]

Notably, the power of refusal to process voluminous requests remains in place under the new enactments. Thus, in Queensland the *Right to Information Act 2009* (Qld) provides that an agency may 'refuse to deal' with an application if it would 'substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions'.[65] As for New South Wales, an agency may 'refuse to deal' with an application under the *Government Information (Public Access) Act 2009* (NSW) if it would 'require an unreasonable and substantial diversion of the agency's resources'.[66] In Tasmania, the *Right to Information Act 2009* (Tas) provides that a public authority may 'refuse to provide the [requested] information without identifying, locating or collating the information', if it would 'substantially and unreasonably divert the resources of the public authority from its other work'.[67] Thus it can be seen that the test remains essentially the same — the request must involve a 'substantial' and 'unreasonable' diversion of resources.

61 Ibid 8; see also ibid.

62 Ibid 8.

63 See, eg, the discussion in FOI Independent Review Panel, 'The Right to Information: Reviewing Queensland's Freedom of Information Act' (Report, State of Queensland, June 2008) 16–22, Recommendations 2 and 3 ('Solomon Report'). Whether that has proven to be the case in practice is beyond the scope of this article.

64 Ibid.

65 *Right to Information Act 2009* (Qld) s 41(1)(a); see also s 41(2), which mirrors *Freedom of Information Act 1982* (Vic) s 25A(2).

66 *Government Information (Public Access) Act 2009* (NSW) s 60(1)(a).

67 *Right to Information Act 2009* (Tas) s 19(1)(a); see also sch 3, read with s 19(1)(c).

V PRACTICE NOTE SIX

In Victoria, the Department of Justice has issued a number of FOI Practice Notes, which have been developed 'to provide guidance in the operation of [the *Act*] to all agencies'.[68] Practice Note Six ('PN6') is on the topic, '"Voluminous" Requests for Access'.[69] Although these guidelines are non-binding, they nevertheless provide assistance. Since the Practice Notes were expressly issued to 'promote consistency of approach in responding to FOI applications',[70] it is fair to assume that agencies and their staff rely on them for guidance. Therefore, it is appropriate to examine how PN6 approaches each aspect of s 25A(1).

A *'Voluminous' Requests*

PN6 makes explicit the link between s 25A(1) and voluminous requests.[71] Put simply, a voluminous request is one which falls within the meaning of s 25A(1). Whether a request is 'voluminous' will depend 'on the facts of each case and cannot be arbitrarily determined'.[72] PN6 says that s 25A is not to be 'confined to sheer volume', so the term 'voluminous request' is 'not strictly accurate and can be misleading'.[73] It means that consideration must also be had to the nature of the request and the availability of agency resources. A request should not be deemed voluminous simply based on a threshold number of pages and documents captured, or hours of processing involved. The focus of the provision is on the predicted effect on agency resources. Thus, a request might pertain to a high volume of documents, but could otherwise be easily identified, located, collated and assessed for access. Such requests may be large in volume but limited in scope and potential exemptions.

B *'Resources' of an Agency*

Section 25A(1) refers to the resources of the agency. According to PN6, the term 'resources' is directed at those 'reasonably required by an agency to process a request consistent with attendance to other priorities'.[74] It does not refer to 'the whole of the resources of an agency' or the 'possible resources it may temporarily be able to obtain', but rather those resources 'currently available'.[75] This statement reflects the approach of the Commonwealth Administrative Appeals Tribunal

68 See Department of Justice, *Practice Notes* (9 September 2010) Freedom of Information <http://www.foi.vic.gov.au/wps/wcm/connect/justlib/Freedom+of+Information/Home/For+Government+Agencies/Practice+Notes/>.

69 Department of Justice, *Practice Note No 6 — "Voluminous" Requests for Access*, 9 September 2010.

70 Department of Justice, above n 68.

71 See also Department of Justice, *Practice Note No 4 — Multiple Requests for Access*, 9 September 2010.

72 Department of Justice, above n 69, Summary.

73 Ibid [1].

74 Ibid [4].

75 Ibid.

('AAT') in *Re SRB and Department of Health*.[76] As shall be seen below, this is somewhat contentious. Such an interpretation, it has been said, potentially allows for a readymade excuse, as the availability of resources at any given time to process a FOI request may to a great extent fall within the control of the agency.

PN6 goes on to list purposes for which 'resources' are used which are relevant to the 'substantial' and 'unreasonable' diversion test.[77] These mirror the considerations set out in s 25A(2). That provision provides that an agency, in deciding whether to refuse to process a purportedly voluminous request, must 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.

It should also be noted that under s 25A(4), an agency is prohibited from taking certain matters into account. In particular, it must not have regard to the reasons given by the applicant for requesting access, or its own belief as to the applicant's reasons.[78] This reflects the general notion that the right of access to information is universal and does not turn upon the intentions of a particular individual with respect to use of that information.

C *'Substantially' Divert*

As to the meaning of the term 'substantially', PN6 offers some clarification. 'Substantial' is expressed as a diversion of resources that is not merely 'nominal'.[79] This is drawn from the Victorian Civil and Administrative Tribunal ('VCAT') case of *Re A and Department of Human Services*,[80] in which the Tribunal endorsed the view that 'substantial' in the context of s 25A(1) meant 'real or of substance

76 *Re SRB and Department of Health, Housing and Human Services* (1994) 19 AAR 178, 187 ('*Re SRB*').

77 Department of Justice, above n 69, [4].

78 See *Freedom of Information Act 1982* (Vic) s 25A(3), which provides: 'The agency … is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind'.

79 Department of Justice, above n 69, [5].

80 (1998) 13 VAR 235 ('*Re A*').

and not insubstantial or nominal'.[81] An alternative definition provided by PN6 is that 'substantial' means 'considerable, serious or significant'.[82] Unfortunately, these are not particularly helpful descriptions. It illustrates that the term is far from precise. As PN6 acknowledges, 'substantiality' is clearly a 'relative concept' which 'will vary from agency to agency'.[83]

In an attempt to provide further guidance as to the meaning of 'substantially', PN6 sets out some 'factors' which may be considered relevant. They include:

- the nature and size of the agency;
- the level of funding or resourcing for FOI;
- the number of other FOI requests on hand (as well as current trends on whether requests received are increasing or decreasing);
- the number of employees who would be capable of assisting with processing the request and their other responsibilities (if any) including how much of their time is usually taken up with FOI matters.[84]

It is apparent from the nature of the factors listed that they are within the influence of the state. The state government can create and abolish its agencies, or alter their nature and size. It can control the allocation of public funding in annual budgets. This dictates agency staffing, including the number of employees available to process FOI requests. It affects the operational capacity of agencies to deal with any increases in the number or complexity of FOI requests. Therefore, it is arguable that s 25A(1) can unintentionally reward the inefficiency of government. Indeed, PN6 notes that if the processing of FOI requests is 'regularly constrained by the level of funding or resourcing', then the 'adequacy of this funding should be reviewed'.[85] This implicitly acknowledges that obstruction of the right of access to information can arise by way of neglect in administering the FOI statutory regime. This sits uneasily with the concept of 'open government' — the underlying concept of the *Act*.

For example, the Ombudsman has been highly critical of one particular state government department, which receives the largest number of FOI requests of all the departments.[86] In its 2010 annual report, the Ombudsman highlighted that approximately one-third of all complaints received about FOI delays over the past five years were directed at that Department.[87] The explanations offered were not unheard of. The Department raised three main issues: (1) resourcing, 'including difficulties in retaining qualified FOI staff and a lack of experienced

81 Ibid 243 (Senior Member Megay), citing *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, 348 (Deane J).

82 Department of Justice, above n 69, [5]; see also Pizer, Dias and Pound, above n 40, (at 2-2746) ¶FOI.25A.120.

83 Department of Justice, above n 69, [5].

84 Ibid.

85 Ibid [4].

86 Ombudsman Victoria, 'Annual Report 2010: Part I' (Report, Victorian Government, 2010) 57.

87 Ibid.

staff during peak holiday periods'; (2) the 'increasing size and complexity of FOI requests'; and (3) 'increased use of technology to store information'.[88] According to the Ombudsman, previous attempts to remedy the delays were unsuccessful. In response, the Department reportedly said it was adopting certain strategies and measures, including '[m]ore consultation with applicants about re-scoping requests to reduce volume and therefore the time taken to complete requests'.[89] This is a commendable approach. Somewhat disconcertingly though, it also vowed to make '[m]ore use of section 25A of the FOI Act to negotiate on, and possibly reject, large requests where the applicant is either unwilling or unable to reduce the size of their requests'.[90] Based on the Ombudsman's findings as to past performance however, it appears there is an underlying issue regarding the level of funding or resourcing for processing FOI requests.

D *'Unreasonably' Divert*

In relation to whether a FOI request 'unreasonably' diverts resources, this again depends 'on each particular case'.[91] According to PN6, it connotes a balancing exercise of the 'predicted impact' of the request against the object of the *Act* in extending 'as far as possible the right of access'.[92] Thus, the effect of a FOI request on an agency cannot be considered in a vacuum. Regard must be had to the overall objective of the *Act*.

In terms of the predicted impact, PN6 provides a number of 'facts and circumstances' considered relevant to determining whether a FOI request would 'unreasonably' divert resources. They include:

- the number, type and volume of documents falling within the request (this can be estimated by representative sampling);
- the complexity of the request;
- whether only a limited number of people may be capable of identifying documents relevant to the request;
- whether only a limited number of people familiar with the documents will be able to assist FOI staff to determine whether the documents are wholly or partly exempt;
- the work time involved in fully processing the request, taking into account that it may not be practicable for those involved in processing the request to concentrate solely on that request, given other work and agency commitments.[93]

88 Ibid.
89 Ibid 60.
90 Ibid.
91 Department of Justice , above n 69, [6].
92 Ibid.
93 Ibid.

The above considerations tend to be measurement based. They are concerned with the number of documents captured, the number of agency staff required for processing (be it for identifying or assessing documents) and the hours of work involved (based on the number, type and volume of documents, the request's complexity, or availability of dedicated staff). These are all relatively tangible factors. An agency can therefore predict with some degree of certainty the impact of a FOI request on agency resources. However, the countervailing right of an individual to access information is somewhat intangible. Assigning corresponding values to such a consideration is inherently more difficult.

VI VICTORIAN AND COMMONWEALTH JURISPRUDENCE

The above analysis of PN6 sheds some light on how agency staff have been instructed to interpret and apply s 25A(1). It demonstrates that certain conceptual issues arise from the terms of the provision. This article will now examine the jurisprudence of the Victorian courts and VCAT in dealing with s 25A(1). Given that s 25A is modelled on s 24 of the *Commonwealth Act*, guidance can also be sought from the Commonwealth jurisprudence, particularly that of the AAT.

A *The Purpose of Section 25A*

The legislative history of s 25A(1) has not been lost on the courts and tribunals. It is the underlying purpose which gives context to the provision's operation. Thus, in *Secretary, Department of Treasury and Finance v Kelly*,[94] the Victorian Court of Appeal correctly acknowledged that:

> 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 [in facilitating the individual's right of access to information] 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.*[95]

As has already been noted, the latter consideration is more certain than the former. That is not to say that the *Act*'s objects clause is insignificant. The courts have previously held that, broadly speaking, the object of the *Act* should be construed

94 [2001] 4 VR 595.

95 Ibid 612–13 [48] (Chernov JA) (emphasis added).

liberally and the exceptions and exemptions narrowly.[96] The force of the objects clause was expressed by Kirby J in the High Court case of *Osland v Secretary, Department of Justice*,[97] where his Honour spoke of the clause in the context of the *Act*'s reformative purpose:

> It is difficult to know how the Parliament of Victoria could have been more emphatic, forthright or clear in indicating the commencement of a new legal era. Courts that construe an Act such as the FOI Act, attentive to preserve the status quo ante, avid to find exceptions, and generous in discerning documents exempt from disclosure, are not being faithful to Parliament's purposes and the declared objects of the Act. An approach hostile to the disclosure of information in documentary form will frustrate the imputed intention of Parliament.[98]

Despite this, the role of the objects clause in the s 25A(1) balancing exercise poses some difficulty. In *XYZ v Victoria Police*,[99] VCAT noted that both parties to the proceeding had submitted that the objects clause would assist in interpreting s 25A(1). However, the Tribunal found that it in fact did not provide 'great assistance' since it was 'very broad'.[100] The object of the *Act* 'enabled it to be relied on by both parties in support of competing and contradictory interpretations of s 25A'.[101] While VCAT's findings were peculiar to the facts of that case (it involved a question as to whether an agency could rely on s 25A(1) to refuse to process *part* of a request) it does indicate that the balance to be struck is not a clear one. To reiterate, the predicted impact of a FOI request on the resources of an agency is tangible. On the other hand, an individual's right of access to information is not.

B *'Resources' of an Agency*

In respect of the notion of 'resources' of an agency, this article revisits the findings in *Re SRB and Department of Health*.[102] In that case, the AAT rejected the notion that 'resources' referred to 'the whole of the resources' of a large agency, or resources which an agency 'might be able to obtain', or those 'constituted by the filling of establishment positions'.[103] This approach is somewhat contentious, when regard is had to the interests of 'open government'. Thus, VCAT in *Re A and Department of Human Services*[104] directly addressed *Re SRB*, suggesting that such comments, 'viewed in isolation', might provide a 'readymade excuse for non-

96 *Ryder v Booth* [1985] VR 869, 877 (Gray J); *Accident Compensation Commission v Croom* [1991] 2 VR 322, 323 (Young CJ); *Victorian Public Service Board v Wright* (1986) 160 CLR 145, 155 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

97 (2008) 234 CLR 275.

98 Ibid 306 [76] (Kirby J).

99 [2007] VCAT 1686.

100 Ibid [30] (McKenzie D-P).

101 Ibid.

102 (1994) 19 AAR 178.

103 Ibid 187 (McMahon D-P, Members Johnston and Stanford).

104 (1998) 13 VAR 235.

compliance' solely on the basis of 'absence of sufficient staff members, rather than on a balanced consideration of the reasonableness of the application'.[105] However, there was no evidence in *Re A* of a deliberate failure to provide sufficient staff for processing FOI requests.

This concern has been echoed interstate. In *Cainfrano v Director General, Premier's Department*,[106] O'Connor P of the New South Wales Administrative Decisions Tribunal cited the remarks made in *Re A* with approval. His Honour went on to say that the approach in *Re SRB* could allow an agency to 'avoid the Act' by managing its resources, so as to leave 'no effective capacity to deal with anything more than requests of a very narrow compass'.[107] This would 'defeat … the very real purpose of the *Act* in providing the community with a mechanism that enables to be exposed to public view complex areas of decision-making'.[108] In any event, it appears that the Victorian and Commonwealth courts and tribunals have yet to determine the extent of the term 'resources' in proceedings where it has been a live issue,[109] or otherwise resolve this difference in opinion.[110]

C *'Substantially' and 'Unreasonably' Divert*

Moreover, some discomfort has been expressed in regards to the terms 'substantially' and 'unreasonably'. 'Substantial' under s 25A(1) is said to be 'a word calculated to conceal a lack of precision'.[111] As previously noted, it has been interpreted along the lines of, 'real or of substance and not insubstantial or nominal',[112] or not 'trivial, minimal or nominal'.[113] These explanations are very much in the same vein as the term they seek to explain. Not much light can be shed in this way. Pizer's commentary focuses on the context in which the term appears.[114] He notes that 'substantially' is: 'used in a relative sense. In other words, it is necessary to know something of the nature and resources of the relevant agency before one could say that processing a particular request would substantially divert the resources of that agency'.[115] Thus, the factors set out above in PN6 are instructive.[116]

As for the term 'unreasonably', it too is said to have 'its share of imprecision'.[117] VCAT has on occasion (applying the public law meaning of 'unreasonably')

105 Ibid 245 (Senior Member Megay).

106 [2006] NSWADT 137.

107 Ibid [59].

108 Ibid.

109 See, eg, *McIntosh v Victoria Police* [2010] VCAT 413, [32], [38] (Senior Member Davis).

110 See, eg, *McIntosh v Victoria Police* [2010] VCAT 1790, [47] (Senior Member Billings), where VCAT cited the relevant passage in *Re A* (1998) 13 VAR 235 with apparent approval.

111 *Re Australian Centre for Independent Journalism and Australian Broadcasting Corporation* (2005) 41 AAR 481, 484 [16] (Senior Member Allen).

112 *Re A* (1998) 13 VAR 235, 243 (Senior Member Megay).

113 *Commissioner of Superannuation v Scott* (1987) 13 FCR 404, 408 (Fischer and Spender JJ).

114 Pizer, Dias and Pound, above n 40, (2-2745–6) ¶ [FOI.25A.120].

115 Ibid (2-2746) ¶ [FOI.25A.120].

116 See also ibid.

117 *Re A* (1998) 13 VAR 235, 243 (Senior Member Megay).

accepted it to mean 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'.[118] In this sense, 'unreasonably' is construed as requiring the agency to exercise its statutory discretion under s 25A(1) within an acceptable range of conduct. The AAT has, along similar lines, found s 24 of the *Commonwealth Act* to mean that the tribunal must 'weigh up the considerations for and against the situation and … form a balanced judgment of reasonableness, based on objective evidence'.[119] In doing so, it is not necessary to show that 'unreasonableness' of the agency's conduct was 'overwhelming'.[120]

Pizer puts forth the argument that such remarks are ill-suited to the present issue.[121] By contrast, he suggests that 'unreasonably' ought to be interpreted as requiring 'a balancing of the predicted impact of processing the request on the agency's resources against the object of the Act to extend as far as possible the right of the community to have access to information in the public sector'.[122] This approach is more grounded in the context of the FOI statutory regime. Indeed, the term 'unreasonably' is directed at the extent of diversion of resources, not the agency's exercise of their statutory discretion. It follows that Pizer's approach is preferable to that espoused by VCAT and the AAT.

Perhaps the most helpful illustration of what amounts to a 'substantial' and 'unreasonable' diversion is provided by a snapshot of voluminous request claims which have been upheld. Of course, what is 'substantial' and 'unreasonable' cannot be arbitrarily determined. Bearing this in mind, it can nevertheless be seen that claims under s 25A(1) were upheld by VCAT in instances which involved:

- 22 000 documents, taking two support staff three to four months and the equivalent of 1.75 FOI officers 15–16 months;[123]
- 15 files containing 6700 pages, taking one person, the property manager, between two to three hours per week for 15–30 weeks;[124]
- 16 000 boxes containing 29 000 Office of Public Prosecutions cases, which would 'require a team of people and take years to carry out';[125] and
- Thousands of pages in hundreds of files and bound books, requiring 'substantial effort' for editing, as well as 'extensive consultation with counsel' and the incurrence of 'significant costs'.[126]

118 Ibid 243–4, citing *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665, 695 (Lord Diplock); see also *Wright v State Electricity Commission of Victoria* (Unreported, VCAT, Senior Member Megay, 29 July 1998) 21–2.

119 *Re SRB* (1994) 19 AAR 178, 187–8 (McMahon D-P, Members Johnston and Stanford), citing *Prasad v Minister of Immigration and Ethnic Affairs* (1985) 6 FCR 155 (Wilcox J).

120 Ibid.

121 Pizer, Dias and Pound, above n 40, (2-2746) ¶ [FOI.25A.140].

122 Ibid.

123 *Re A* (1998) 13 VAR 235.

124 *Chapman v Parks Victoria* (Unreported, VCAT, Senior Member Ball, 6 December 1999).

125 *Coulston v Office of Public Prosecutions* [2001] VCAT 10, [12] (obiter).

126 *Gunawan v Victoria Police* [1998] VICCAT 1187.

As to the AAT, claims under s 24 of the *Commonwealth Act* were found to be made out where the workload included:

- 260 minuted items, 2000 pages of submissions, taking more than 60 days;[127]
- 220 files, taking 140 days on the basis of 200 folios per file and 1.5 minutes per folio;[128]
- 300 files containing 22 500 folios, taking at least 2 years, if not more;[129] and
- searching for emails and computer stored information created in 1992, stored in any of more than 400 locations, involving 'checking individual computers' and 'back up tapes'.[130]

These examples illustrate that a rather high threshold must be satisfied before the tribunals will be persuaded to uphold a voluminous request claim. Most recently, the Victorian Supreme Court in *Chief Commissioner of Police v McIntosh*[131] reaffirmed on appeal that 'the requirements of s 25A(1) are not easily satisfied'.[132] The provision 'should only be applied to a "clear case" of substantial and unreasonable diversion'.[133] In that case, a FOI request was made to Victoria Police for access to police staff rosters. VCAT had found that the request would require an estimated 55 hours for processing. The Court, allowing the appeal due to an error of law, expressed the tentative view (before remitting the proceedings back to VCAT) that such a commitment was 'unlikely' to be 'sufficient to satisfy the requirements of s 25A(1)(a)'.[134]

Thus, in order to overcome the opaqueness of what constitutes a 'substantial' and 'unreasonable' diversion, it appears the courts and tribunals have focused on the evidence tendered on the processing involved and made findings of fact as to the credibility of such estimates. From the existing cases, it seems that evidence is typically given by witnesses who work at the agency and who can purportedly attest to such matters. This poses an interesting question as to the role of courts and tribunals in assessing the adequacy of such evidence. In particular, whether there is a tendency to defer to the views of agency witnesses.

D *The Role of Courts and Tribunals*

This article posits that the courts and VCAT have not shown any hesitation in making up their own mind as to whether a request will 'substantially' and 'unreasonably' divert agency resources. A sample of cases can be cited in support.

127 *Re Shewcroft and Australian Broadcasting Corporation* (1985) 2 AAR 496.

128 *Re Swiss Aluminium Australia Ltd and Department of Trade* (1986) 10 ALD 96.

129 *Re SRB* (1994) 19 AAR 178.

130 *Re Langer and Telstra Corporation Ltd* (2002) 68 ALD 762.

131 [2010] VSC 439.

132 Ibid [32] (Emerton J).

133 Ibid, citing *Secretary, Department of Treasury and Finance v Kelly* [2001] 4 VR 595, 599 [6] (Ormiston JA).

134 Ibid [34]. The proceedings have yet to be decided following remittal to VCAT.

In *Asher v Department of Innovation, Industry and Regional Development*,[135] VCAT commended a FOI officer on the 'excellent way in which he performs his quite onerous tasks' and acknowledged that the methodology he had adopted in estimating the processing involved was 'what his experience has led him to believe to be the most efficacious methodology'.[136] Yet the Tribunal gave the officer's evidence little weight, as it was simply 'as he sees it'.[137] The Tribunal did not hesitate to find that the processing involved was 'nowhere near' as complicated as the officer had posited.[138]

Also, in *Wright v State Electricity Commission of Victoria*,[139] VCAT rejected evidence given by the initial agency decision-maker. He was found to have no personal familiarity with the documents, nor any first-hand knowledge of the resources required to process the request.[140] Thus, it could not be said that he was able to form 'a proper view' on the matter.[141] His knowledge 'was insufficient to allow a proper consideration of those pre-requisites contained in section 25A(2)'.[142]

Moreover, in the case of *McIntosh v Victoria Police*[143] VCAT observed that an agency did not appear to have 'grappled' with a request's likely impact on time and agency resources.[144] No estimate was provided to the Tribunal.[145] Nor was there any credible attack on the estimate provided by the applicant's witness.[146] Furthermore, no evidence was called as to the availability of other agency staff to assist.[147]

Finally, the Victorian Court of Appeal in *Secretary, Department of Treasury and Finance v Kelly*[148] was concerned with FOI requests for documents pertaining to 'the reticulation of gas'. The requests were made in pursuit of litigation, following an explosion and fire at a gas plant. A senior FOI officer undertook a sampling process which yielded an index of 2600 files purportedly required for examination, taking one full-time staff member an estimated 14 years for review. On appeal, the Court of Appeal held that it was open to VCAT to reject the evidence led by the agency. In particular:

- the index itself showed that many of the files were not relevant to the requests and would not require examination;
- the senior FOI officer had not made relevant inquiries to staff who may have had requisite knowledge of the location of many of those documents;

135 [2005] VCAT 1734.
136 Ibid [17] (Senior Member Megay).
137 Ibid.
138 Ibid.
139 (Unreported, VCAT, Senior Member Megay, 29 July 1998).
140 Ibid 5.
141 Ibid.
142 Ibid.
143 [2008] VCAT 916.
144 Ibid [29] (Harbison V-P).
145 Ibid [28].
146 Ibid.
147 Ibid [31].
148 [2001] 4 VR 595.

- the sampling evidence was inadequate (21 of the 2600 files were selected, of which 10 were actually examined. Some of these took only a short time to examine);
- the senior FOI officer was relatively inexperienced; and
- the senior FOI officer did not personally assess the file index or list of files.[149]

E *Summary*

In summary, the jurisprudence of the courts and tribunals serves to reinforce the conceptual difficulties which exist in applying the 'substantial' and 'unreasonable' diversion test. In spite of this, the Victorian Supreme Court and VCAT have successfully maintained a strict standpoint as to the operation of s 25A(1). To satisfy that provision, the impact of voluminous requests must typically involve thousands of documents or pages, hundreds of files and a number of months or even years for processing. VCAT in particular reaches its findings by way of rigorous examination of the evidence before it. There is little doubt the Tribunal has sought to reach its own views on the credibility of such evidence. For example, regard can be had to: the general credibility of agency witnesses; the extent of their personal knowledge of, or involvement in a matter; the extent of their professional experience; whether the likely impact on existing resources has been properly considered; whether any alternative estimates can be convincingly dismissed; evidence about the availability of other agency resources; the methodology adopted in processing estimates; and the measures taken to confirm such figures.

VII OBLIGATION TO CONSULT

Section 25A(6) establishes procedural obligations which an agency must comply with before it can exercise its power of refusal to process a request under s 25A(1). The provision states that:

> An agency … must not refuse to grant access to a document under subsection (1) unless the agency … 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.

149 Ibid 617 (Chernov JA).

As can be seen, s 25A(6) provides a set of obligations relating to agency consultation. First, an agency must give written notice to the applicant stating their intention to refuse access. Second, they must give the applicant 'a reasonable opportunity to consult' with a specified member of agency staff, with a view to amending the request (so it is not voluminous). PN6 suggests that a period of 28 days will usually suffice.[150] However, it will 'depend on the facts in each case'.[151] Third, the agency must, 'as far as is reasonably practicable', give the applicant any information which would assist in this regard. PN6 suggests that this could include information about:

- the types or classes of documents the agency holds in relation to the subject matter;
- the way in which the agency's records are made and kept; and
- suggestions as to how the request could be narrowed.[152]

But would not include complete lists or indexes of documents.[153]

These suggestions reflect the Ombudsman's recommendations.[154] The provision of such information can assist applicants with identifying the documents they seek access to. It is likely to eliminate documents unintentionally captured by a FOI request and thereby reduce the request's volume.

The statutory obligations to consult have been strictly enforced by the courts and VCAT. Thus, in *Newnham v Victoria Police Force*,[155] a failure to give notice in writing of the agency's intention to refuse to process resulted in a s 25A(1) claim being rejected by the Victorian Supreme Court.[156] Another example is *Mildenhall v Department of Education*,[157] where the agency failed to respond to a request within statutory time limits. Being a deemed refusal, the applicant sought review before VCAT. At that stage, the agency relied upon s 25A(1). The Tribunal held that it could not uphold the claim in such circumstances,[158] because it would allow the agency to both 'frustrate the scheme inherent in sections 25A(1) and (6)', by avoiding its obligations under the latter subsection,[159] and '"string out" the handling of every broad-ranging request for documents that it received, if it so desired'.[160]

Thus, the obligations to consult under s 25A(6) constitute an appropriate safeguard in the exercise of the right of refusal to process voluminous requests, and are

150 Department of Justice, above n 69, [8].

151 Ibid.

152 Ibid [7].

153 Ibid.

154 Ombudsman Victoria, above n 53, 8, 28.

155 (1997) 12 VAR 387.

156 Ibid 406–9 (McDonald J).

157 (Unreported, VCAT, Senior Member Lyons, 9 April 1999) ('*Mildenhall*').

158 Cf both *McIntosh v Victoria Police* [2010] VCAT 1790, [45] (Senior Member Billings) and *Lovell v Department of Human Services* [2010] VCAT 1965, [46] (Lacava V-P) which distinguished *Mildenhall* on the basis that an actual decision to refuse to process was made under s 25A(1) in these cases, albeit out of time. In both instances, the agency had provided the applicant with an opportunity to consult, in accordance with s 25A(6).

159 *Mildenhall* (Unreported, VCAT, Senior Member Lyons, 9 April 1999) [31].

160 Ibid [32].

strictly upheld by the courts and VCAT as such. However, the above-mentioned findings of the Ombudsman must also be taken into account. The assistance provided by agencies must be proper and not merely perfunctory. It would be best practice for heightened attention to be paid by agencies to these statutory obligations, so as to ensure full effect is given to s 25A(6).

VIII STATISTICAL ANALYSIS OF SECTION 25A(1) CLAIMS

Since s 25A(1) was initially implemented to address 'only a small minority' of FOI requests, it is a worthwhile exercise to consider how widespread its use has been in practice. A statistical analysis of s 25A(1) claims may provide some indication as to whether the provision is being applied with appropriate restraint.

Table 1 below displays the number of s 25A(1) claims made, for FOI requests received across all Victorian government agencies since the provision's introduction. The statistics distinguish between claims made: (1) at first instance by an agency; (2) upon internal review; and (3) upon external review before VCAT. The figures are collated from the annual reports on Freedom of Information by the Attorney-General for the State of Victoria.[161] Table 1 shows that although the statistics fluctuate from year to year, there is no apparent trend in the frequency with which agencies have invoked s 25A(1).

Table 1: Number of s 25A(1) claims per financial year

Year	First Instance Decision	Internal Review	VCAT Review
1993–1994	26	1	0
1994–1995	29	7	0
1995–1996	30	11	2
1996–1997	50	10	0
1997–1998	95	17	2
1998–1999	77	23	1
1999–2000	53	4	2
2000–2001	73	11	3
2001–2002	98	12	6
2002–2003	91	10	5
2003–2004	74	7	1
2004–2005	85	4	0
2005–2006	63	4	0
2006–2007	130	18	1

161 See Department of Justice, *Annual Reports* (14 September 2010) Freedom of Information <http://www.foi.vic.gov.au/wps/wcm/connect/justlib/Freedom+of+Information/Home/About+Us/Annual+Reports/>.

Year	First Instance Decision	Internal Review	VCAT Review
2007–2008	144	16	2
2008–2009	55	6	1
2009–2010	74	11	1
Average	**73**	**10**	**2**

Table 2 below indicates that there is no discernable variation in the proportion of s 25A(1) claims being made. That table exhibits s 25A(1) claims as a percentage of the total number of FOI requests or applications for review under the *Act*, across all Victorian government agencies. It shows that the proportion of claims made at first instance ranges from 0.26 per cent (upon the provision's introduction in 1993–94) to a high of 0.78 per cent (in 1997–98) and a low of 0.19 per cent (in 2008–09). These statistics also highlight that the number of s 25A(1) claims made at first instance is proportionately very small, at less than 1 per cent of all FOI requests received.

Table 2: Proportion of s 25A(1) claims per financial year

Year	First Instance Decision (%)	Internal Review (%)	VCAT Review (%)
1993–1994	0.26	0.32	0.00
1994–1995	0.28	2.39	0.00
1995–1996	0.28	3.78	1.30
1996–1997	0.41	3.47	0.00
1997–1998	0.78	5.33	0.66
1998–1999	0.59	8.52	0.63
1999–2000	0.37	1.55	1.40
2000–2001	0.42	2.79	2.78
2001–2002	0.49	2.68	4.92
2002–2003	0.45	2.72	4.35
2003–2004	0.35	1.70	0.96
2004–2005	0.38	0.87	0.00
2005–2006	0.29	1.11	0.00
2006–2007	0.54	5.98	0.85
2007–2008	0.57	4.73	1.37
2008–2009	0.19	1.76	0.51
2009–2010	0.24	2.58	0.53
Average	**0.41**	**3.08**	**1.19**

A number of further remarks may be made when comparing the different stages of the process. Table 1 shows that the greatest number of s 25A(1) claims on average are made at first instance (73 claims). Conversely, the lowest number of claims on average are made upon review to VCAT (2 claims). This is not particularly surprising, since the administrative review process is intended to have a filtering

effect. While the difference between each stage might seem substantial, it is not dissimilar to the statistical patterns for other exemptions and exceptions claimed under the *Act*. Moreover, it can be noted from Table 2 that the greatest proportion of s 25A(1) claims on average is at the internal review stage (3.08 per cent). This could mean a number of things. For instance, it may indicate that applicants are more likely to seek internal review for s 25A(1) claims. Alternatively, it could suggest that the internal review process is resolving many of these claims, thereby decreasing the proportion proceeding to review by VCAT. It is not possible to make a conclusive statement from the data available. It is also not possible to identify the proportion of claims upheld on review to VCAT, as opposed to merely claimed.

Thus, the statistics confirm that there has been no apparent trend in the frequency of s 25A(1) claims made by agencies. Moreover, the proportion of claims made is very small. Based on the above analysis, it could not be argued that agencies have shown diminishing restraint over time in invoking s 25A(1). Nor is there any evidence for the argument that voluminous requests account for a disproportionate number of refusals.

IX CONCLUSION

The above analysis has demonstrated two main propositions. First, the voluminous requests provision contains a number of conceptual difficulties. The terms 'substantial' and 'unreasonable' are inherently imprecise. They must also be balanced against an individual's right of access to information, which was introduced for the purpose of furthering 'open government'. This is itself a relative concept. Moreover, the availability of agency 'resources' is, at least to some extent, within the control of the agency.

Second, and in spite of such hindrances, the practical operation of the provision has been satisfactory. Government agencies appear generally to have refrained from making s 25A(1) claims. No alarming trends can be discerned from the available statistics. In any event, it would be best practice for agencies to pay heightened attention to their statutory obligations to consult with applicants. As for the Victorian Supreme Court and VCAT, both have adopted a strict and burdensome approach to s 25A(1). They have rigorously examined the evidence led by agencies in support of such claims. This reflects how the provision was intended to operate. Refusals to process FOI requests should be reserved for the small minority of requests deserving of such a response.

Therefore, the power of refusal to process voluminous requests has not proved, in practice, to be 'anti-democratic', 'anti-open government' or 'otherwise contrary to the spirit of FOI'. It has its rightful place in the FOI statutory regime. Section 25A(1) is conceptually imperfect, but it remains a provision of utility.