



Re TL4 and Shire of York [2026] WAICmr 16

Decision and reasons for decision

Complainant:	TL4
Agency:	Shire of York
OIC ref:	F2025188
Decision date:	27 August 2026
Sections considered:	Section 20

Decision

1. The Shire of York's (**agency**) decision, dated 9 May 2025, to refuse to deal with the complainant's access application under section 20 of the *Freedom of Information Act 1992* (WA) (**FOI Act**) is confirmed.

Summary

2. This matter relates to the agency's decision to refuse to deal with the complainant's access application under section 20 of the FOI Act.
3. There are three questions to be considered in determining whether an agency can refuse to deal with an application under section 20, namely:
 - has the agency taken reasonable steps to help the complainant change their application to reduce the amount of work needed to deal with it;
 - would dealing with the application divert a substantial portion of the agency's resources away from its other operations; and
 - would dealing with the application divert an unreasonable portion of the agency's resources away from its other operations.
4. All three questions must be answered "yes" before an agency can refuse to deal with an application under section 20.
5. In this case, the agency had initially refused to continue dealing directly with the complainant and therefore did not take reasonable steps to assist the complainant to change the access application to reduce the amount of work needed to deal with it prior to making its decision.

6. However, the agency has since taken steps to help the complainant to reduce the scope of their access application during the external review process. Those steps are relevant to the determination of the matter. In the circumstances, I am satisfied the agency has now taken reasonable steps to help the complainant change their application to reduce the amount of work needed to deal with it.
7. The work involved in dealing with the application, estimated at approximately 150 hours, is considerable and would divert a substantial portion of this small agency's resources away from its operations.
8. I am also satisfied the diversion would be unreasonable. Although there is a public interest in public safety relevant to the access application, the request extends well beyond the period necessary to address the public interest. Having regard to the resources required to process the application, the agency's limited resources and the impact on its other work, the diversion of those resources would be unreasonable.
9. Accordingly, the agency's decision is justified.
10. My full reasons are set out in the following sections.



Patrick Ky
Information Access Deputy Commissioner

27 August 2026

Reasons for decision

The issues to be determined

11. The issue to be determined in this case is whether the agency may refuse to deal with the access application on the basis the work involved in dealing with it would divert a substantial and unreasonable portion of the agency resources away from its other operations.
12. In dealing with this issue, I am required to determine:
 - whether the agency took reasonable steps to help the complainant to change the application to reduce the amount of work needed to deal with it;
 - whether dealing with the complainant's application, on the basis of the complainant's proposed revised scope (**complainant's proposed scope**), would divert a substantial portion of the agency's resources away from its other operations; and
 - whether dealing with the complainant's proposed scope would divert an unreasonable portion of the agency's resources away from its other operations.
13. All three must be satisfied before the agency may refuse to deal with an application under section 20.

Section 20 of the FOI Act

14. Section 20 of the FOI Act provides if an agency considers the work involved in dealing with an access application would divert a substantial and unreasonable portion of its resources away from its other operations, the agency may refuse to deal with the application.
15. The provision is designed to ensure the operations of government agencies are not unduly impeded by agencies having to deal with unreasonably voluminous access applications. It is one of a number of provisions in the FOI Act aimed at striking a balance between the public interest in open and accountable government and the public interest in the ongoing effective operation of agencies.¹
16. Section 20 should be read consistently with the objects of the FOI Act. Therefore, it should only be used as a last resort after making reasonable attempts to assist an applicant to narrow their access application.² There is a corresponding obligation on applicants to work cooperatively and reasonably with agencies in this process.³
17. To rely on section 20, an agency must first take reasonable steps to help the access applicant to change the application to reduce the amount of work needed to deal with it.⁴ Only if after such assistance has been given, the agency still considers dealing with the application would involve a substantial and unreasonable diversion of its resources from its other operations, may the agency refuse to deal with the application.⁵

Consideration

18. I have examined the agency's decision, the parties' submissions and the agency's freedom of information (**FOI**) file maintained in respect of the complainant's access application.

¹ *Re Ravlich and Attorney General; Minister for Corrective Services* [2009] WAlCmr 17, [15] (**Re Ravlich**).

² *Singh v Legal Aid Commission (No 2)* [2015] NSWCATAD 5, [105].

³ *Re Park and SMHS – Royal Perth Hospital* [2014] WAlCmr 18, [36]-[38] (**Re Park**).

⁴ FOI Act, s 20(1).

⁵ FOI Act, s 20(2).

The agency took reasonable steps to help the complainant to reduce the scope of the application

19. The first question is whether the agency took reasonable steps to help the complainant change their application to reduce the amount of work needed to deal with it. This involves a consideration of the history of the matter between the parties from the date of the access application and the nature and degree of assistance the agency offered the complainant.
20. It is apparent, from the agency's FOI file, the agency took some steps to assist the complainant to narrow the scope of their access application.
21. However, by a letter sent in April 2025, the agency then required the complainant to appoint an advocate to act on their behalf and it refused to deal directly with the complainant to further reduce the scope of the access application. The agency submits this was necessary due to a deteriorating relationship with the complainant, and wellbeing concerns for its staff and Councillors. I will not comment on whether the agency's concerns are well-founded but nevertheless consider the agency's approach was misguided.
22. There is nothing in the FOI Act that allows an agency to refuse to communicate with the complainant. In my view, the agency's refusal to communicate with the complainant other than through an advocate is inconsistent with the objectives of the FOI Act. I consider the agency could have addressed its concerns (whether or not well-founded) in other more appropriate ways, for example by nominating a single point of contact within the agency with whom the complainant could communicate in writing.
23. In circumstances where the agency refused to continue dealing directly with the complainant, I consider the agency did not take reasonable steps to assist the complainant to change the access application to reduce the amount of work needed to deal with it prior to making its decision.
24. However, it is open to me to consider whether the steps the agency took since its decision constitute reasonable steps to help the complainant change the application to reduce the amount of work needed to deal with it.⁶
25. It is well established a merits review is conducted on the material before the reviewer at the time the review is undertaken.⁷ The Western Australian Supreme Court has also observed the Information Commissioner has an inquisitorial function to investigate and make inquiries as the Information Commissioner thinks fit and 'when deciding any matter in relation to an access complaint, the Information Commissioner should have (and is entitled to have) regard to his or her own investigations and is not bound to determine the access complaint by having regard only to the reasons given by the original decision-maker'.⁸
26. The steps the agency took to help the complainant reduce the scope of their access application during the external review are summarised below:
 - On 22 December 2025, the agency provided, among other things, a breakdown of the estimated 615 documents, from 1 January 2016 onwards, within particular search locations.
 - The agency also provided a breakdown of the estimated 515 documents, from 1 January 2023 onwards, within particular search locations.

⁶ *Re The University of Western Australia and Department of Jobs, Tourism, Science and Innovation* [2025] WAICmr 6. See also 'AZG' and *Services Australia (Freedom of information)* [2025] AICmr 196, [18] in respect of section 24AA of the *Freedom of Information Act 1982* (Cth).

⁷ *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [35]-[37].

⁸ *Pearlman v WA A/Information Commissioner* [2019] WASC 257, [75]-[76]. See also FOI Act, s 76(1)(b).

- Further, the agency suggested the scope may be narrowed, for example, to a specific topic such as level 1 bridge inspections, preventative maintenance for a particular year, emergency repairs for a particular year or contracted works undertaken in a particular year.
 - A copy of the agency's response was forwarded to the complainant on 23 December 2025.
 - On 11 May 2026, this office forwarded to the complainant a table identifying indicative document bundles or categories of documents the agency prepared.
 - On 18 June 2026, the agency provided its proposed scope, a copy of which was communicated to the complainant on the same day.
27. The complainant submitted a full list of all available documentation must be provided to them to enable an effective scope reduction. However, this would defeat the key purpose of section 20 of the FOI Act. In *Re Mineralogy Pty Ltd and Department of Industry and Resources*, the former Acting Information Commissioner stated:⁹
- In providing assistance to an access applicant, an agency is not obliged, under the FOI Act, to list all possible documents of relevance, identify the precise number of documents falling with the scope of an access application or provide inspection of those documents to enable an applicant to select those that he or she may be interested in, since to do so would defeat a key purpose of section 20, which is to avoid processing of FOI access applications that would divert substantial and unreasonable resources away from operational activities.
28. In light of the above, I consider the assistance the agency gave the complainant is reasonable in the circumstances. My view is the agency was not required to take further steps, as the section 20 process had ceased to be productive.

Dealing with the application would divert a substantial and unreasonable portion of resources

29. Section 20 allows an agency to refuse to deal with an access application if the work involved in dealing with it would divert a 'substantial and unreasonable' portion of the agency's resources away from its other operations.
30. The expression 'substantial and unreasonable' is not defined in the FOI Act. However, those words have been the subject of considerable discussion both in the context of section 20 and its interstate equivalents. Section 20, and its interstate equivalents, have also been the subject of broader discussion concerning their operation and application. I set out some of that discussion in the Context section at the end of this decision, with which I generally agree.
31. Importantly, and perhaps not expressly articulated in some previous Information Commissioner decisions, the terms 'substantially' and 'unreasonably' should not be treated as synonymous. Each term must be given its own meaning and effect; the diversion of agency resources must be both substantial **and** unreasonable.
32. An agency seeking to rely on section 20 must establish both elements.¹⁰ The mere fact an agency will be required to expend substantial resources to process an access application does not, without more, establish the diversion is unreasonable. The agency must separately demonstrate that diverting those resources from its usual operational functions would be unreasonable. The two requirements are distinct, although the same circumstances may support a finding of both substantial and unreasonable.

⁹ [2008] WAICmr 39, [33] (*Re Mineralogy*).

¹⁰ This is consistent with the approach taken by the Commonwealth, Queensland and Victorian Commissioners: see Context section below.

Dealing with the application would divert a substantial portion of resources

33. The word 'substantial' is not defined in the FOI Act and therefore should bear its ordinary meaning of 'large in size, value'.¹¹ For the purposes of section 20, the inquiry is directed to the extent and magnitude of the diversion.
34. Whether dealing with an access application would divert a substantial portion of resources from the agency's other operations is a question of fact in the individual case.
35. In my view, relevant factors in assessing whether dealing with an access application would divert a substantial portion of an agency's resources away from its other operations include:¹²
- the terms of the request, especially whether it is broad or expressed in general terms;
 - the period of time covered by the application;
 - the number of documents and the number of pages potentially within scope;
 - the type and complexity of documents or potential documents within scope;
 - how easily the documents can be identified and assessed;
 - whether consultation with third parties is required under sections 32 and 33 of the FOI Act, and the extent of any such consultation;
 - the level of certainty in any estimates, including whether there is a real possibility that processing time may take longer than initially estimated;
 - where those documents are located and how they are stored;
 - the number of staff who can identify the documents and their usual duties; and
 - whether legal advice or consultation with third parties is required.
36. In its original decision, the agency stated there are approximately 615 potential documents within the scope of the access application stored as electronic records, on network drives, emails and as hardcopy documents.
37. On 21 July 2026, the agency revised its estimate. Based on the complainant's proposed scope, the agency considered there are at least 850 documents within scope. The agency's detailed reasons for the revised estimate are set out in the Context section below. However, broadly speaking:
- additional documents had been identified since the original decision;
 - further searches are required to identify certain documents, estimated to be an additional 50 documents;
 - consultation is likely required with 5-8 third parties; and
 - it will take 156 hours to process the complainant's proposed scope based on an estimate of 10 minutes for review and edit per document, plus an additional 15 hours of decision-maker time to conduct a final documents review, check the exemptions claimed and draft the notice of decision.
38. The complainant submitted the agency has only provided an estimate of the time and effort required to process the access application. I consider it acceptable for the agency to provide an estimate of the work, provided it sets out the material facts and assumptions on which it relies in forming the estimate. An agency cannot be obliged to specify exactly how much time

¹¹ Macquarie Dictionary Online.

¹² *Re Mineralogy*, [30], [48]; *Re 'R' and Department of Family and Children's Services* [1996] WAICmr 45 (*Re 'R'*); *Colefax v Department of Education and Communities No 2* [2013] NSWADT 130, [24]-[25] (*Colefax*).

and energy would be spent in processing the request. Requiring precision would mean the agency would have to do the very work that section 20 is designed to prevent.¹³

39. The complainant also referred to the agency's history of failing to deliver safe road construction projects, and to observe fundamental construction practices and probity requirements, including an alleged fraudulent funding application. The complainant appears to contend these failures are relevant to the credibility of the agency's estimates of the work required to process the access application. In my view, this submission is misplaced. The alleged agency failures are unrelated to FOI matters, and an officer of the agency not involved in the alleged failures provided the estimate. In any event, I have undertaken an independent assessment of the time estimated to process the complainant's proposed scope.
40. On the available information, I am satisfied dealing with the application would divert a substantial portion of the agency's resources for the following reasons:
- The period covered is approximately 15 years.
 - Documents are kept in multiple digital and physical locations.
 - There are at least 850 potential documents which need to be reviewed, and possibly a further 50.
 - Given the requested documents include asset valuations, communications with the contractor and another agency, and payment documentation relating to third parties, I consider it likely consultation with multiple third parties is required.
 - I consider the agency's estimate of 10 minutes to review and edit each document to be on the high side. However, that over-estimation is broadly balanced by the fact the overall estimate did not account for:
 - third party consultation with multiple parties,
 - further searches yet to be undertaken,
 - the likelihood of further documents identified for review and editing.
 - I consider the agency's estimate of an additional 15 hours of time to conduct a final documents review, check the exemptions claimed, and draft the notice of decision excessive, and estimate an additional 10 hours of time is reasonable.
 - Therefore, I consider an estimate of approximately 150 hours is reasonable (approximately 20 working days).
41. The work involved in dealing with the application is considerable. In my view, a diversion of approximately 150 hours of the agency's resources is substantial in the sense contemplated by section 20 of the FOI Act.

Dealing with the application would divert an unreasonable portion of resources

42. An estimate of processing time is only one factor under section 20. Having determined processing the request would substantially divert the agency's resources, I must now consider whether it would also unreasonably divert those resources.¹⁴
43. There may be circumstances where the processing of an access application would have a substantial effect on an agency but may not necessarily be unreasonable in the circumstances.¹⁵ In my view, whether a diversion of resources is unreasonable is a question

¹³ *Re Ravlich*, [39]. See also *McIntosh v Victoria Police* [2008] VCAT 916, [11] in respect of the equivalent provision in the Victorian legislation.

¹⁴ *'AZG' and Services Australia* [2025] AICmr 196, [47].

¹⁵ *'ACW' and Australian National Maritime Museum* [2023] AICmr 4, [21].

of fact and degree which calls for a balancing of all the legitimate interests involved.¹⁶ It requires consideration of:¹⁷

- the resources involved in processing the request;
 - the size of the agency and the resources it ordinarily has available to deal with access applications, and whether they have competing interests;
 - the impact on other work of the agency;
 - any demonstrable importance of the documents to the applicant;
 - whether there is a significant public interest in the documents requested;
 - whether the applicant has taken a cooperative approach to narrowing or otherwise amending the scope of the application; and
 - other steps the agency has taken to publish information of the kind the applicant requested.
44. In taking these factors into account, it is important to stress an agency cannot avoid its statutory duty by withholding resources or failing to provide proper resources for its FOI function. The principal officer of an agency should ensure their agency is sufficiently resourced to process requests. If the processing of requests is regularly constrained by the level of FOI resourcing, the agency should review the adequacy of its resourcing.
45. I accept the agency, like many other local government and small agencies, does not have a dedicated FOI officer. The role is one of the duties of a manager whose other duties include legislative and local law compliance, policy and agreement reviews, oversight of HR, customer service, library, ICT and records management, and budget management. The manager is assisted by one officer whose duties are also broad.
46. I also accept the agency is operating at or near full FOI capacity, having received its highest number of FOI applications in 5 years. Allocating those resources to this application, which will take an estimated 150 hours to process, would require staff to be diverted from their ordinary duties, with consequential delays to the agency's other operational functions and responsibilities.
47. I have given weight to the complainant's submissions the requested documents are important to the issue of public safety. In particular, I note the complainant's qualifications and experience as an engineer informs their concerns about the Glebe Street Bridge's (**bridge**) condition, its maintenance and the risks it poses to safety.
48. However, the breadth of the complainant's proposed scope and the extent to which the agency's resources would be diverted are significant.
49. The issue of public safety identified in the access application relates to the lack of maintenance following an inspection carried out in 2016 (**2016 inspection**), to alleged mismanagement of a contract for works for the bridge in 2023 (**2023 contract**) and the quality of the works carried out under that contract.
50. The complainant's proposed scope, however, includes matters which appear to go well beyond what appears necessary to address the concerns they submitted to this office. In particular, it includes financial documents not limited to the 2023 contract and other documents which date back to 2010. Based on the information before this office, I consider dealing with the access application would involve a significant diversion of the agency's

¹⁶ *Re Chief Executive Officer, Services Australia and Farrell* [2020] AATA 2390, [53] (**Farrell**); *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of Information)* [2015] AATA 995, [43].

¹⁷ *Farrell* [2020] AATA 2390, [54]; *Colefax*, [24]-[25].

resources away from its other operations and the diversion would be unreasonable in the circumstances.

51. As noted above, I am also satisfied the agency took reasonable steps to help the complainant refine and reduce the scope of their access application and the amount of work needed to deal with it. Accordingly, I find the agency's decision to refuse to deal with the application pursuant to section 20 is justified in the circumstances.

Context

Background

52. By a letter dated 26 March 2025, the complainant applied to the agency for access to documents related to the Glebe Street bridge. Relevantly, the request:
- referred to the identification of a fault at the east end of the approach to the bridge during the 2016 inspection;
 - referred to the lack of general maintenance on the bridge in the seven years following the 2016 inspection; and
 - referred to issues with the 2023 contract.¹⁸
53. On 26 March 2025, the complainant agreed to reduce the scope of their access application to documents from 2010 onwards.
54. On 2 April 2025, the complainant confirmed they did not require personal information.
55. On 10 April 2025, the complainant agreed to meet an officer of the agency on 16 April 2025 to discuss and clarify the scope of the access application. The agency confirmed this in a letter dated 11 April 2025.
56. On 15 April 2025, the officer of the agency advised the complainant they were unable to meet as planned.
57. On 16 April 2025, the agency sent a text to the complainant cancelling the meeting.
58. On 1 May 2025, the agency sent the complainant a letter informing them the existing scope of the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations. The agency referred to its obligation under the *Work Health and Safety Act 2020* (WA) to protect its workers and required the complainant to appoint an advocate.
59. On 9 May 2025, by notice of decision, the agency refused to deal with the access application under section 20 of the FOI Act.
60. By a letter dated 4 June 2025, received by this office on 6 June 2025, the complainant applied for external review.
61. On 22 December 2025, the agency provided this office with a breakdown of the number of potential documents and further suggested the scope be narrowed to a specific topic such as level 1 bridge inspections, preventative maintenance for a particular year, emergency repairs for a particular year or contracted works undertaken in a particular year. This information was provided to the complainant on 23 December 2025.
62. On 27 December 2025, the complainant informed this office they required all the documents they requested.

¹⁸ The complainant's submissions dated 17 February 2026 refers to the contract as the '2023 Glebe St Bridge construction contract'.

63. On 13 February 2026, this office provided the parties with its preliminary view. In summary, the preliminary view was that the agency's decision to refuse to deal with the access application under section 20 of the FOI Act is justified.
64. On 17 February 2026, the complainant provided submissions to this office as they did not accept the preliminary view. The complainant submitted, among other things, a full list of all available documentation must be provided to them to enable an effective scope reduction.
65. In response to enquiries from this office, the agency provided further submissions and information including a table identifying indicative document bundles or categories of documents. The table was provided to the complainant on 11 May 2026 with a request for them to consider the table and propose a reduced scope.
66. On 13 May 2026, the complainant provided this office with a proposed scope reduction (**complainant's proposed scope**). On the same day, this office provided the complainant's proposed scope to the agency.
67. On 5 June 2026, the agency responded the work involved in dealing with the complainant's proposed scope would still divert a substantial and unreasonable portion of the agency's resources away from its other operations.
68. In response to a further enquiry from this office, on 18 June 2026, the agency proposed a scope which it could process (**agency's proposed scope**). The agency's proposed scope was provided to the complainant on 18 June 2026.
69. On 19 June 2026, the complainant informed the OIC they did not agree with the agency's proposed scope and declined to further reduce the scope of the access application.

Parties' submissions

Complainant submissions

70. The complainant provided submissions in their internal review application, their external review application and submissions to this office. In summary, the complainant submits as follows:
 - The complainant does not require the aid of an advocate.
 - There are no legal grounds under the FOI Act to demand an advocate be appointed to represent the complainant.
 - The steps the agency took since its decision to help reduce the amount of work needed to deal with the access application cannot 'cure' the agency's failure to take such reasonable steps prior to its decision.
 - The complainant requires a full list of all available documentation to enable them to reduce the scope of the application effectively.
 - Disclosure of the documents requested in the access application is in the interest of public safety for reasons including:
 - the documents relate to the agency's alleged systemic failure to maintain the bridge;
 - the lack of appropriate road management practices has the potential to pose risks to road users;
 - a bridge failure may cost many people their lives;
 - continuation of the current road management practices is expected to have a significant negative impact on the expected life of the road assets;

- the information is required to, among other things, lobby for additional funds to repair or replace the bridge; and
- there are issues with the management of the 2023 contract and the way the works under that contract was carried out.
- The agency's estimate of time and effort seems excessive.
- The alleged systemic failures by the agency in infrastructure management should be considered in assessing the credibility of the agency's estimates of the work required to process the application.

Agency submissions

71. The agency's submissions are set out in its initial decision, its internal review decision and responses to requests for information. In summary, the agency submits as follows:
 - The agency required the complainant to appoint an advocate to act on their behalf and argued this was necessary due to a deteriorating relationship with the complainant, and wellbeing concerns for its staff and Councillors.
 - The agency waited a reasonable amount of time to receive notice of the complainant's chosen advocate to continue attempts to reduce the scope of the application.
 - The agency made its decision when no correspondence was received from the complainant.
 - The agency provided details of its estimate of the time and work required to process the complainant's proposed scope.
 - The agency does not have a dedicated FOI officer, and the role is one of the duties of the Manager (assisted by another officer with broad duties).
72. Most relevantly, on 21 July 2026, the agency gave a detailed explanation of why it considered the proposed scope of the access application would divert a substantial and unreasonable portion of its resources away from its other operations:
 - The initial document count was an approximate figure based on initial searches and understanding of the scope of the access application.
 - A document count within the FOI document searches folders, and high-level review (using document subject lines) was undertaken to exclude out of scope items and any obvious duplicates.
 - The total number of documents in the document search folders is 1111, 371 of which were identified as either out of scope or a duplicate, resulting in an estimate of 740 documents.
 - The agency also identified an additional folder of documents relating to bridge works in 2023, which contained approximately 110 documents which had not been captured in the document search folder. With these additional documents, the total estimate increased to 850 documents.
 - Within the current search folders there are limited documents with financial information or design drawings, to meet the scope items of:
 - grant funding opportunities,
 - asset valuations,
 - Bridge Preventative and Routine Funding Schedule,
 - invoices,

- purchase orders,
- grant funding applications,
- accrual and remittance documents,
- payment documentation, and
- design drawings and risk assessments.
- Additional searches are required to find these documents from 2010-2025, relating to the above scope items. The agency has not been able to conduct additional searches to identify the number of documents within these categories but estimates there would be an additional 50 documents.
- The agency estimates it would likely have to consult approximately 5-8 third parties.
- The agency estimates it would take 156 hours to process the complainant's proposed scope based on an estimate of 10 minutes of review and edit time per document, plus an additional 15 hours of the Manager's time to conduct a final documents review, check the exemptions claimed, and draft the notice of decision.

Relevant legislation

Freedom of Information Act 1992 (WA)

73. Section 20 of the FOI Act provides:

- (1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.
- (2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.
- (3) If, under subsection (2), the agency refuses to deal with the access application, it has to give the applicant written notice of the refusal without delay.
- (4) The notice has to give details of —
 - (a) the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings are based; and
 - (b) the rights of review under this Act and the procedure to be followed to exercise those rights.

Summary of relevant decisions

Western Australia

74. While the expression 'substantial and unreasonable' is not defined in the FOI Act, it has been the subject of consideration by former Information Commissioners. Those decisions note:
- the question of whether dealing with an access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations involves consideration of the number and type of documents involved in the access application; the usual work of the agency, and an estimate of the resources to be

devoted to the task of dealing with the application in accordance with the statutory requirements of the FOI Act;¹⁹

- ‘the work involved in processing a request will only substantially and unreasonably divert the resources of an agency if the work is real or of substance and not insubstantial or nominal and if it is unreasonable having regard to factors, such as workload’;²⁰
- the assessment may take into account the number and type of documents involved in the access application, the usual work of the agency and an estimate of the resources to be devoted to the task of dealing with the application;²¹ and
- section 20 does not contemplate commitment of an agency’s entire resources. Rather, it is concerned with the resources that can reasonably be allocated to dealing with a freedom of information application, having regard to the agency’s other operational priorities.²²

75. In *Re Mineralogy*, the former Information Commissioner stated:

Relevant factors to indicate that the work involved in dealing with an access application would divert a substantial and unreasonable portion of an agency’s resources away from its other operations include such things as:

- the time period to which the application relates;
- the number of documents or potential documents covered by the application;
- the ease with which the specific documents can be identified and assessed;
- the location of those documents and the nature in which they are stored by the agency;
- the number of people competent to identify the documents and the normal duties of those people;
- the need to take legal advice and/or consult with third parties.

No individual factor, on its own, usually will be sufficient and determinative to establish that dealing with a particular access application would divert a substantial and unreasonable portion of an agency’s resources away from its other operations.

Commonwealth

76. The Administrative Appeals Tribunal in *Langer* considered what was then the Commonwealth equivalent of section 20 of the FOI Act. The Deputy President said:²³

... it seems to me that the work involved in processing a request will only substantially and unreasonably divert the resources of an agency if the work is real or of substance and not insubstantial or nominal and if it is unreasonable having regard to factors, such as workload.

77. In *SRB and SRC and Department of Health, Housing, Local Government and Community Services*, the full Administrative Appeals Tribunal stated the resources considered by the Commonwealth equivalent of section 20:²⁴

¹⁹ *Re ‘R’*.

²⁰ *Re Park*, [41], adopting interpretation of a similar provision under the *Freedom of Information Act 1982* (Cth) in *Langer and Telstra Corporation Ltd* [2002] AATA 341, [115] (*Langer*). See also *Re Mineralogy*, [42].

²¹ *Re Mineralogy*, [30]; *Re ‘R’*.

²² *Re Park*, [43]. See also *Re Mineralogy*, [44].

²³ *Langer*, [115].

²⁴ (1994) 33 ALD 171, 179 (*SRB and SRC*).

... 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.

Queensland

78. In *60CDYY and Department of Education and Training*, the Queensland Acting Right to Information Commissioner noted:²⁵

The term '*substantially and unreasonably*' is not defined in the [*Right to Information Act 2009* (Qld)]. It is therefore appropriate to consider the ordinary meaning of these words. '*Substantial*' is relevantly defined as meaning '*considerable amount, quantity, size, etc.: a substantial sum of money*' and '*of a considerable size or value: substantial funds*'. '*Unreasonable*' is relevantly defined as meaning '*exceeding the bounds of reason; immoderate; exorbitant*' and '*immoderate; excessive: unreasonable demands*'.

79. Guidance from the Office of the Information Commissioner Queensland notes, in applying the Queensland equivalent of section 20 of the FOI Act, '[i]t is important to remember that the diversion of agency resources must be both substantial **and** unreasonable'.²⁶

Victoria

80. In '*DR8*' and *VicForests (Freedom of Information)*, the Public Access Deputy Commissioner stated the words 'substantially' and 'unreasonably' are not defined in the *Freedom of Information Act 1982* (Vic) (**Victorian Act**) and are to be given their ordinary meaning.²⁷
81. The Public Access Deputy Commissioner also stated that in determining whether the equivalent provision in the Victorian Act applies, she was required to consider whether processing the applicant's request would involve a substantial diversion of the agency's resources, and secondly, whether processing the request would involve an unreasonable diversion of the agency's resources.²⁸
82. 'Substantial' has been interpreted to mean the diversion of resources must be more than merely nominal (minor).²⁹
83. In relation to the concept of 'unreasonableness', it is not necessary to show the extent of unreasonableness is overwhelming. The task is to weigh up the considerations for and against the situation and to form a balanced judgement of reasonableness, based on objective evidence.³⁰
84. Finally, in *Secretary, Department of Treasury and Finance v Kelly*, the Victorian Court of Appeal noted the equivalent provision in Victoria 'should only be applied to a clear case of substantial and unreasonable diversion of a department or other agency'.³¹

New South Wales

85. The New South Wales Administrative Tribunal in *Colefax v Department of Education and Communities No 2* observed a similar provision under the then New South Wales legislation.³²

²⁵ [2017] QICmr 52A, [12] (citations omitted).

²⁶ <https://www.oic.qld.gov.au/government/right-to-information/refusal-to-deal#diversion-of-resources-must-be-both-substantial-and-unreasonable>

²⁷ [2021] VICmr 288, [17] (**DR8**).

²⁸ *DR8*, [25].

²⁹ *Re A and Department of Human Services* (1998) 13 VAR 235, 247.

³⁰ *DR8*, [29], adopting the Administrative Appeal Tribunal's discussion in *SRB and SRC*, [34].

³¹ [2001] VSCA 246, [6].

³² *Colefax*, [20].

provides that a decision maker must be satisfied that an access application would require both an unreasonable and a substantial diversion of an agency resources, before refusing to deal with an application.

86. *Colefax* is particularly helpful because it identifies non-exclusive factors which need to be balanced in determining whether an access application is likely to constitute an unreasonable and substantial diversion of resources:³³

- the terms of the request, especially whether it is broad or expressed in general terms;
- the demonstrable importance of the documents to the applicant, which may be relevant to what constitutes a reasonable time and a reasonable effort in the particular case;
- whether the request is reasonably manageable, having regard, but not conclusively, to the size of the agency and the resources it ordinarily has available to deal with access applications;
- the agency's estimate of the number of documents affected by the request, and, by extension, the number of pages involved, the officer time required and the salary cost;
- whether the agency's initial assessment was reasonable, and whether the applicant has taken a cooperative approach to narrowing or otherwise amending the scope of the application;
- the time limits binding the agency; and
- the degree of certainty that can be attached to the agency's estimate of the documents affected and time required to process the application, including whether there is a real possibility that processing time may take longer than initially estimated.

³³ *Colefax*, [24]-[25]. See also *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137, [63].