

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

GENERAL LIST

VCAT REFERENCE NO. G4/2012
G72/2012

CATCHWORDS

General List *Freedom of Information Act* s. 25A; whether request for documents would substantially and unreasonably divert the resources of the agency; electronic storage and retrieval of data

APPLICANT	The Age Company Pty Ltd
RESPONDENT	CenITex
WHERE HELD	Melbourne
BEFORE	Deputy President H Lambrick
HEARING TYPE	Hearing
DATE OF HEARING	9 August 2012
DATE OF ORDER	18 September 2012
DATE OF REASONS	18 September 2012
CITATION	

ORDER

The Respondent's decision under section 25A of the *Freedom of Information Act* 1982 to refuse to process the request of the Applicant is affirmed.

DEPUTY PRESIDENT H LAMBRICK

APPEARANCES:

For Applicant	Ms Fyfe
For Respondent	Mr M Batskos, solicitor

REASONS

Introduction

- 1 On 7 February 2012¹, CenITex refused access to documents sought by the Age in two separate applications. In refusing access CenITex relied on the exemption provided for in section 25A of the *Freedom of Information Act* 1982 (Vic) (“Act”), namely that the work involved in processing the requests would substantially and unreasonably divert the resources of CenITex from its other operations.
- 2 Section 25A of the Act relevantly provides:
 - “(1) The agency or Minister 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 undertaken, if the agency or Minister is satisfied that the work involved in processing the request –
 - (a) in the case of an agency–would substantially and unreasonably divert the resources of the agency from its other operations; ...”
- 3 The Age in each of these proceedings seeks to review the decisions to refuse to process the requests. The Age submits that any suggestion by CenITex that the requests would substantially and unreasonably divert the resources of CenITex from its other operations is grossly exaggerated. The Age contends that CenITex in dealing with the requests is being obstructive and attempting to avoid its obligations under the FOI Act.

The Requests

- 4 The first request for access (**G4/2012**) sought:
 - “1. Emails, letters, memos or summaries of complaints received by CenITex about its contractors and/or contractor staff made externally by other departments or within by CenITex VPS staff;
The time frame for this request is January 1, 2010 to September 30, 2011.
 2. Copies of the CenITex taxpayer-funded corporate credit card monthly statements of executives and contractors. The time frame for this request is January 1, 2009 to September 30, 2011.
 3. Copies of the electronic diary for Thana Velummylam and Peter Blades, with the names of third parties redacted, but not their organisations. The time frame for this request is January 1, 2009 to September 30, 2011.

¹ Although there is a more convoluted history to this matter, the tribunal by orders dated 1 June 2012, ordered that the decision of CenITex in its letter to the Age dated 7 February 2012 be treated as the decision under review in the proceeding pursuant to s. 53 of the FOI Act

4. Exit interviews, with all identifying personal information redacted. The time frame for this request is January 1, 2009 to September 30, 2011.”
- 5 The second request for access (**G72/2012**) sought:
- “1. Reports, summaries, briefs, emails or memos from the beginning of 2010 to the present [ie 5 October 2011], containing customer feedback results on CenITex services;
- This request includes, but is not limited to, summaries that discuss information collected in the quarterly customer surveys by Customer Service Benchmarking Australia.
2. Quarterly reports prepared by CenITex executive for the Department of Treasury and Finance from the beginning of 2010 to the present [ie 5 October 2010].
- We seek those reports summarizing cost savings achieved due to CenITex’s centralisation of IT services across the Victorian public sector and those projected in the future.
- We also seek the dollar value of savings estimated by the CEO, as outlined on p.7 of the 2009-2010 Annual Report. We understand a similar dollar value calculation has been made for the current Annual Report which has not yet been publicly released. See the note below for the summary from the previous years Annual Report.
3. The gift and hospitality register of CenITex board, which is maintained by the board secretary.
4. The gift and hospitality register of CenITex itself, which we understand is held by the EA of the CEO.”

The Evidence

- 6 The Age did not lead any evidence but Ms Fyfe in a statement dated 13 July 2012 and in her submissions before me challenged CenITex to support its reliance on section 25A.
- 7 I received witness statements and heard evidence from two witnesses for CenITex - Mr Keith Cullen who is the IT Service Manager with CenITex and Mr Ross Gilmour who is the Director Corporate Communications and the authorised FOI decision-maker at CenITex.
- 8 Both witnesses gave detailed evidence in support of CenITex’s decision to refuse to grant access to the documents.
- 9 Mr Cullen gave evidence in relation to the work involved in processing the email components of paragraphs 1 and 3 of the G4/2012 request and paragraph 1 of the G72/2012 request. Mr Gilmour gave evidence in relation to both requests.
- 10 The essence of Mr Cullen and Mr Gilmour’s *combined* evidence was that:

G4/2012

(1) Emails, letters, memos or summaries of complaints received by CenITex about its contractors and/or contractor staff

- 11 There is *no* separate database for collating emails or other documents containing *complaints* about contractors or contractor staff and such complaints could be made to almost anyone within the organisation at any point in time. Because most employees deal with customers on a daily basis, anyone could receive a complaint which may then be escalated to a Team leader who may escalate the matter further depending on the circumstances.
- 12 Accordingly, in order to comply with the request, *all* emails and documentation, which came into CenITex during the relevant period, would have to be retrieved and then examined to see whether they contained relevant material. Over the relevant period there were approximately 1 521 166 emails.
- 13 Mr Cullen gave evidence that the process for retrieving emails is time-consuming as it would require CenITex to restore user's mail files from monthly back-up tapes which are stored by an external third party contractor organisation – DataBank. The restoration was said to be necessary to ensure all relevant documents were retrieved capturing current and past employees and contractors emails and deleted emails which the online archive would not contain.
- 14 Mr Cullen gave an exhaustive description of the processes involved in restoring the back-up tapes for the relevant months (33 in total). He said that each month would need to be separately restored. In summary the process (engaging internal or external staff with the necessary qualifications) would be as follows:

Preparatory phase

- (a) Identification of existing hardware or server equipment with the appropriate amount of data storage capacity for the restoration process which would need to be compatible with the storage system of the externally located Data Centre (4 hours).
- (b) Establishment of a connection between the server and the storage system at CenITex (4 hours). The externally located Data Centre would also need to configure the storage capacity on the storage system it manages (4 hours).
- (c) Connection of the storage system and server to each other (8 hours).
- (d) Additional storage capacity would need to be made available on the Lotus Domino Server for the restoration process (1 hour).

- (e) Mr Cullen gave evidence that this preparatory phase could take 6-8 working weeks depending on the availability of various individuals required for the exercises and the possible purchase of new equipment.

Back-up restoration process

- (f) The 33 monthly back-up tapes would need to be recalled from the offsite storage facility and delivered to the Data Centre who would have to load the tapes. The tapes would need to be catalogued in order to identify specific mail files and the data would be transferred to the designated server. Thereafter the tape would need to be unloaded and returned to the external facility (35 days).

Full text searching

- (g) A “domain search” would need to be created to enable full text search capacity which for practical purposes could take place on only 3 months of restored tapes at a time. The configuration would take 4 hours per 3 months. The computer would finish the process, taking a number of days.
- (h) Any encrypted emails would require an additional process of decryption which would require the purchase of specific software or the creation of same in-house. Mr Cullen estimated the process of decryption to be an hour per encrypted email. Assuming 50% of the mail files were encrypted this would equate to 67 days work for one month’s email files – a total of 1462 working days for all.
- (i) The restored back-up tapes would then be available for searching by Mr Gilmour to identify the relevant documents.

15 Mr Cullen gave a total time estimate for the process described ranging from 107-1902 work days at a cost between \$57,109 - \$970,252.

Processing of FOI request

- 16 Evidence was then given by Mr Cullen and Mr Gilmour that after the process described above would come the process of examining all emails for relevant material.
- 17 Mr Gilmour gave evidence that scanning 1,521,166 emails at the rate of 20 seconds per email would equate to 241 work weeks full time.
- 18 Mr Gilmour gave evidence as to the 2-pronged process involved in processing the requests – namely the identification of relevant documents and then the examination (and internal/external consultation) of them in order to determine whether or not the documents were exempt from access.
- 19 He gave evidence that most of the letters , memos and summaries received were likely to be communicated by email so that they would be covered by the process described above but that it may take one day to locate any hard copy files.

20 It is only after these arduous processes are complete that decisions about whether or not to grant access can be made.

(2) Credit card statements

21 Mr Gilmour gave evidence that CenITex is not in possession of any corporate credit card monthly statements for executives and contractors. CenITex has not issued executives or contractors with corporate credit cards therefore there is nothing to process.

(3) Electronic diaries for Thana Velumylam and Peter Blades

22 Mr Cullen gave evidence that the electronic calendars of the 2 former employees for the relevant 33 month period are located on mail files contained on the monthly backup tapes. They are not available on the online archive. To identify and locate the electronic calendar diaries, it would be necessary to go through the same restoration process described above. The restored mail files would then need to be interrogated to find the calendars on a monthly basis.

23 Mr Gilmour gave evidence that once he had been given access to the restored files, that it would take an estimated 15 minutes to find and print each calendar entry for the 33 month period equating to 8.25 hours.

(4) Exit Interviews

24 Mr Gilmour gave evidence that exit interviews are voluntary. They are sometimes face-face, othertimes an exit interview template is completed; sometimes both. Approximately 30% of staff/contractors complete an exit interview. During the relevant time there were 57 (documented) interviews conducted. Mr Gilmour gave evidence that it would take 2 hours for them to be located and collated for the purpose of processing as a FOI request.

G72/2012

(1) Reports, summaries, briefs, emails or memos containing Customer Feedback

25 In relation to the email component of this request, the evidence mirrored that given in relation to G4/2012 (1).

26 Evidence was also given by both Mr Cullen and Mr Gilmour that CenITex has a database which contains feedback from customers called “QuickPoll” It is designed to measure levels of customer satisfaction. Polls are conducted once per week on customers who received assistance that day. On average 243 survey responses are received each month which are collated into a database and form the basis of a monthly report. Mr Gilmour estimated that it would take 3 days for one person to collate the results.

27 “Go To Assist” is a remote access tool allowing remote access to a customers desktop. It includes a customer satisfaction tool which opens automatically at the end of the remote session. On average there are 80 responses provided per month. The results are collated monthly. Mr Gilmour gave evidence that it would take at least 9 days to locate, identify,

copy, print and collate the survey responses for the relevant time period. Mr Gilmour gave evidence that additional reports would take one hour to be forwarded for his consideration.

(2) Quarterly reports and Cost savings documents

28 Mr Gilmour gave evidence that a decision granting partial access to these documents was made on 7 May 2012 (following a similar request made by the Age).

(3) CenITex Board Gift and Hospitality Register

29 Mr Gilmour gave evidence that it is not difficult to locate the Register but there would be a protracted consultation process before a decision could be made as to whether parts of the documents were exempt.

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Both G4/2012 and G72/2012

Summaries of complaints and feedback

- 31 Mr Gilmour gave evidence which was relevant to both of the requests.
- 32 He gave evidence that summaries of complaints and feedback might be contained in records logged by the CenITex Service Desk. He described how the Service Desk “tickets” calls made to it and thereby records the nature of any complaint, feedback request for service and so on. Mr Gilmour gave an estimate that it would take 2 minutes on average to read a ticket to ascertain its relevance, if any to the request. During the relevant timeframe there were 637 000 tickets created by the Service Desk all of which would have to be scanned for relevance. Mr Gilmour estimated that it would take 2 minutes to identify a relevant ticket and extrapolating out that it would take 606.67 working weeks to identify all relevant tickets.
- 33 Mr Gilmour gave further evidence that the Customer Operations Review Group Minutes of each monthly meeting with each CenITex customer department may also contain summaries of complaints and feedback.
- 34 Internally based complaints would be located in the People and Culture area of CenITex and their location, identification and collation would take 5 hours.

Discussion

- 35 CenITex is the Victorian Government’s Centre for Information Technology Excellence. It delivers information and communications technology, infrastructure, application hosting and desktop services to the public sector.
- 36 The Age expressed surprise that customer complaints and feedback are not collated in the one spot and that there is no such collation or complaint

register within CenITex. No evidence was called however by the Age to contradict either this evidence or the evidence of Mr Cullen and Mr Gilmour that anyone within the organisation could field complaints. Neither witness was cross-examined on the point to any effect.

- 37 This was pivotal evidence in the case because if I accept it, which without it having been successfully challenged, I do, it is hard to contradict the proposition that that the only method of complying with the request as currently framed would be to have *all* emails (retrieved and) examined to ascertain whether they contained complaints and/or feedback.
- 38 During the course of the evidence Ms Fyfe on behalf of the Age stated that she wished to capture the *process* of complaints and that she (probably) only required emails which came through the customer service group. Ms Fyfe stated that she did not want all complaints and feedback but rather the *results* of the feedback through the monthly reports.
- 39 That is not however the way in which the current request is framed. CenITex could not unilaterally narrow the meaning of the request in the manner suggested by the Age. That is what the consultation process is for.
- 40 Having made the above findings, it is a reasonably natural flow to accept that, the retrieval and examination of all emails over a 22-33 month period would be an arduous and laborious process, given the number of email accounts on the CenITex computer system (averaging 1011 accounts over the relevant time period). I accept the substance of the evidence given by Mr Cullen and Mr Gilmour that the processing of the requests is likely to take many months (at least).
- 41 Nevertheless, I turn to an examination of the evidence given and make the following comments.
- 42 I found the timelines of 6-8 weeks for the preparatory phase of the restoration process to be somewhat overstated by CenITex. I found it unlikely that CenITex could not coordinate its staff and the Data Centre staff more efficiently than described by Mr Cullen. Nevertheless I accepted that there would be at least some days work involved in the preparatory phase.
- 43 Mr Cullen gave evidence that the existing server storage capacity may not be sufficient to perform the necessary restorations as well as the core functions of CenITex.
- 44 Mr Cullen's evidence was based on the premise of restoring *all* of the restored monthly back-up tapes at the same time. Although he conceded that partial restorations may be achievable and thereby take less storage capacity, his evidence was that this would then be more time-consuming as the restoration process would need to be duplicated multiple times. He gave evidence that it would therefore be safer for CenITex to purchase further dedicated equipment for the purpose of complying with the request and core business.

- 45 Whilst I accept that the hardware CenITex possesses is earmarked and used for the core services provided by CenITex, I found it surprising that CenITex, the Victorian Government's centre for Information and Technology Excellence who would have expertise and experience in the recovery and restoration of back-ups, (which I would have expected it would perform on a regular basis on dedicated servers), would not have sufficient equipment for this request to be processed.
- 46 I consider it unlikely that additional server equipment would need to be purchased.
- 47 A significant amount of the time and expenditure described by Mr Cullen pertained to decryption. There was no basis given by Mr Cullen for assuming 50% of emails were encrypted. He simply did not know how many emails would be encrypted but assumed a large number. No samples were attempted as CenITex contended that having determined the process to be a substantial and unreasonable diversion of its resources that it need not proceed to process the request.
- 48 Whilst I found the estimate of one hour per encrypted email to be staggering, I was not given any evidence to contradict the evidence of Mr Cullen, so am left to find that the *process* required and time frame as described by him is accurate. However there is no basis upon which I could find that as many as 50% of the emails would be encrypted.
- 49 I accept in the circumstances of this case that the examination process would be of itself an extremely time-consuming one, however I am unable to make any real assessment of the time and resources required.
- 50 Mr Gilmour gave evidence that he was unable to give any realistic estimate of the time involved in making a decision in relation to documents once they were located, identified and collated. He considered that there *may* be tens of thousands of documents which may be identified as falling within the request. He gave evidence that if there *were* that many documents, the diversion of resources in estimating access charges, examination of the documents, consultation, deciding which (parts of) documents to grant access to and making the documents available would be a substantial diversion of resources. Mr Gilmour stated that he could not process the applications alone within any reasonable time frame anticipated under the Act.
- 51 Section 25A(6) of the Act stipulates that an agency must provide to the applicant a reasonable opportunity to consult with an agency with a view to reframing the request in a manner which would remove the ground for refusal.
- 52 Following receipt of the Age's request CenITex wrote to the Age on 14 December 2012 and 23 December 2012 and explained why it considered the scope of the application to be too large. The Age has never accepted the explanations given but has preferred to adopt a cynical approach expressing

disbelief and incredulity. Although Ms Fyfe states that she had made this clarification clear in her communication with CenITex, I do not accept this to be the case. I was not shown any material, which supported that contention. I accept that CenITex is required to look objectively at the request and could not limit the request.

Conclusion

- 53 Section 25A is intended to enable the processing of some voluminous requests to be resisted where the request cannot be sufficiently narrowed during the consultation process and such processing would unduly impact on the relevant agency's functions.
- 54 Section 25A(2) provides a non-exhaustive list of the resource implications on an agency which the agency may take into account in determining whether to refuse the request.
- 55 I have concluded that each of the access applications would divert a substantial and unreasonable portion of CenITex's resources away from its other operations.
- 56 There will frequently be a speculative aspect to an agency's assessment of resources and the impact which processing will have on it. I have however accepted that the estimate of the resources required as outlined in the evidence before me is reasonable and not exaggerated as suggested by the Age. I have not found that CenITex in handling the complaints documents in the way it has handled them has deliberately tried to circumvent the FOI legislation.
- 57 The obligation to comply with the Act is an important obligation of any agency. However a balance must be struck between the object of the Act and the need to ensure that the requests under the Act do not cause substantial and unreasonable disruption to the day to day workings of the government through its agencies.
- 58 It is the *combination* of the following factors, which leads me to that conclusion that CenITex have established that the work involved in processing the requests would substantially and unreasonably divert the resources of CenITex from its other operations.
- 59 The time period for G4/2012 (1) and G72/2012 (1) is extensive, covering (when combined) some 33 months.
- 60 The terms of the request are very broad. CenITex's estimates are that they would need to go through virtually every email to ascertain whether the email contained a complaint or feedback. I accept that this would involve in excess of 1 million emails.
- 61 The location of the documents means that they will need to be retrieved from an external source.

- 62 The way in which the documents are stored means that they will need to be recovered. I accept that the emails would have to be processed on a server and that it would be a time consuming and labour intensive process.
- 63 The ease with which the specific documents can be identified and assessed has been demonstrated to me to be no straightforward feat. Retrieval is a real and live issue because of the form in which the information is held. I accept that the information sought is not currently contained within discrete documents. Whilst this may be seen by the Age as unfortunate, the right of access is a right of access to existing documents. I find that the documents are stored in the manner described in the evidence before me and that the time in restoring and examining the documents would be great.
- 64 I am satisfied that the identification, location and collation of the documents requested would be arduous in the manner described by Mr Cullen and Mr Gilmour. The checking of the backups would then be substantial and would take many months.
- 65 Whilst the Age criticises the estimates given by CenITex the uncertainty works in both directions. It may be that CenITex has over-estimated *some* of the timeframes, but it may also prove that some of the timeframes were in reality underestimated. Whilst it may be that the processing of the requests would not in reality take years, I accept that it is more likely than not that the processing of the requests would run into many months rather than weeks.
- 66 The general operations of CenITex do not appear to warrant more than one FOI officer. Mr Gilmour is the only authorised FOI decision maker under section 26 of the Act. He is also responsible for a range of other important communications duties. In making this comment I take into account the fact that CenITex has not historically had a large FOI demand. Since it was created in 2008 CenITex has only received 8 FOI requests. All of those were in the 2011/2012 financial year and 6 were made by the Age.
- 67 The time lines for compliance with a request are another indicia of what a reasonable amount of time is to process a request. I accept that the request in this case would fall well out-side the parameters of the legislation. It would not be possible for CenITex to comply with the request within 45 days.
- 68 The consultation period was not utilised by the Age. Having examined the correspondence between CenITex and the Age I am satisfied that the steps taken by CenITex to assist the Age to make a valid application were reasonable. The refusal by the Age to co-operate and limit the terms of the request has not assisted.
- 69 When weighing all of these considerations I find that CenITex was justified in deciding that the work involved in processing each of the applications in their present form would divert a substantial and unreasonable portion of its resources away from its other operations. I am satisfied that the work

involved in searching for emails and computer stored information would be substantial.

- 70 I am also satisfied that the subsequent decision-making process – namely the examination of the documents to determine whether they were exempt from access would also require Mr Gilmour or a delegate to scan the documents, which would also be extremely time-consuming. It would be premature without knowing the number of documents involved to speculate on whether the task of decision-making thereafter would have been substantial.
- 71 Accordingly I confirm CenITex’s decision to refuse to process the application.

DEPUTY PRESIDENT H LAMBRICK