THE IMPACT OF TECHNOLOGY ON REFUSAL DECISIONS ABOUT 'VOLUMINOUS' FOI REQUESTS IN AUSTRALIA AND OTHER JURISDICTIONS

Mick Batskos*

I will begin by quoting a passage from the blog of a FOI practitioner from the UK, Mr Paul Gibbons, otherwise known as FOI Man. He raises a very interesting question about what may *very loosely* be called 'voluminous requests':[1]

> If you've ever watched Monty Python and the Holy Grail, you'll recall King Arthur's encounter with the Black Knight. The knight challenges him to combat. They battle. Arthur chops his arm off and claiming victory, makes to leave. But the knight, in denial of all sense (yes, I know it's a comedy, but bear with me on this), won't accept defeat and insists that Arthur keep fighting. No matter how many limbs Arthur lops off, the knight is insistent that the conflict continue. Eventually Arthur walks off whilst the knight, now literally without a leg to stand on, continues to shout after him.
>
> But when you're providing a public service and legally obliged to respond to [FOI requests], you can't just walk off. Or can you?

Some would say that, subject to at least some degree of consultation with applicants, the 'voluminous' request provisions in Freedom of Information/Right to Information (FOI/RTI) legislation have that precise effect. They enable an agency to just walk off when processing will all be much too hard…….or do they?

In this paper, I address the following points:

- What is a 'voluminous' request and does it actually have to be 'voluminous' before you can refuse to process a request? I propose a change in terminology. If you fail to adopt my suggestion, then consistent with the earlier Monty Python reference, it will result in you being put in the *comfy chair* and poked with the *soft cushions*.[2]
- I consider the question of whether the development of technology[3] has had an impact on decisions to refuse access to documents on the basis of an unreasonable diversion of resources. The position in various Australian jurisdictions is considered first.
- Comparable provisions, cases and other materials in some overseas jurisdictions are considered and some overall conclusions are drawn.

'Voluminous' requests misnomer

The title of the paper is about the impact of technology in Australia and other jurisdictions on decisions about 'voluminous' FOI requests. The word 'voluminous' is placed in inverted commas intentionally. This is because I wish to highlight and address it specifically as a preliminary matter before considering the main thesis of my paper.

The reference to 'voluminous' requests is often used by FOI practitioners. By FOI practitioners I mean FOI officers, managers of FOI officers, legal advisers, information commissioners, ombudsmen, tribunals and courts. The term 'voluminous' requests has crept into the jargon and firmly established itself in the glossary of language used by FOI

* *Mick Batskos is Executive Director, FOI Solutions, Solicitors and Consultants.* *This paper was presented at the 2013 AIAL National Administrative Law Conference, Canberra, ACT, 19 July 2013.*

practitioners. Many see it as a convenient, shorthand expression to describe one of the bases on which a request for access may be declined.

I see it as a dangerous misnomer which misrepresents the true nature of the tests to be applied in each jurisdiction. The provisions in question are *not* based on volume, but rather on the effect that processing a request for access would have on resources of an agency, its ability to carry out its day to day functions, or other similar impediments.

Relevant legislative provisions

The nature of the tests in the relevant legislative provisions in Australia varies slightly from jurisdiction to jurisdiction and has varied within some jurisdictions over time.[4]

An agency can refuse access in the following circumstances:

- 'the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations…'
- 'the work involved in processing the request… would substantially and unreasonably divert the resources of the agency from its other operations'.
- 'work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions'.
- 'dealing with the application would require an unreasonable and substantial diversion of the agency's resources.'
- 'the work involved in dealing with the application … would, if carried out … substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions'.
- 'the work involved in providing the information requested … would substantially and unreasonably divert the resources of the public authority from its other work'.
- 'the work involved in dealing with it within the period allowed … or within any reasonable extension of that period … would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions'.
- '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'.
- 'providing access would unreasonably interfere with the operations of the organisation.'

How did the term 'voluminous' request come into being?

There is no certainty as to how the term 'voluminous' request came into being. At best, it is possible to hypothesise based on the historical introduction and development of such provisions in legislation in Australia. That legislative history has contributed to the term 'voluminous' being adopted as a shorthand expression of the types of requests captured by these provisions and the nature of this basis for refusing access.

When the *Freedom of Information Act 1982* (Cth) (*FOI Act*) was being introduced in the House of Representatives, during the second reading speech on the Bill, the Minister introducing the Bill stated generally in relation to the Bill (presumably in relation to what became s 24 of the *FOI Act*):

> Secondly, a number of the provisions have regard to the resource implications of requests, **particularly requests which would involve searching for and collating a large number of documents**, by empowering an agency to refuse a request if the work involved would substantially interfere with its other operations.[5] (emphasis added)

When s 24(1) of the *FOI Act* was enacted, it provided:

> Where –
>
> - a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter; and
> - the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, **having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency** or of the office of the Minister, the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken. (emphasis added)

Cases considering this provision in that form began to explain what decision makers were required to turn their minds to by referring to the requirement of 'having regard to the number and volume of the documents' as 'are they voluminous?'[6]

In 1991, s 24 of the *FOI Act* was repealed and replaced with a new s 24(1) which included the following:

> 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; or…'

Even after the introduction of this new provision, which removed the limited consideration of only the number and volume of documents and difficulty in locating the documents, the shorthand description of 'voluminous' requests remained in the jargon in the practice of FOI and the decided cases, albeit less often.[7]

Similarly, when the same provision was introduced in Victoria in 1993, the Victorian Attorney-General stated in her Second Reading Speech:

> **Voluminous requests** have caused serious problems in the administration of freedom information since its inception. Evidence given to the Legal and Constitutional Committee in its 38th report to Parliament suggest that although the number of **voluminous requests** was relatively small it nevertheless caused severe disruption to agencies. At present there is no provision in the Act to refuse to process the request on the grounds that it would unreasonably and substantially divert the agency's resources.[8] (emphasis added)

In many Australian jurisdictions, the term 'voluminous' has over the years remained an inherent part of the description of requests to which these types of provisions apply;[9] this includes when referring to the amount of stored electronic data or information.[10] The term 'voluminous request' can also be found in the catchwords of decided cases[11] and has even crept into the language of the Victorian Court of Appeal.[12]

Even under the current Australian Information Commissioner review regime, the term 'voluminous' request appears to be part of the jargon in referring to requests resulting in thousands of pages of material being released as 'voluminous requests'.[13] Although, in

fairness, recent decisions under ss 24, 24AA and 24AB of the *FOI Act* by the Australian Information Commissioner have so far steered clear of such references.[14]

To this day, if you speak to FOI practitioners about requests or applications for access possibly falling within these provisions, they will almost always use the term 'voluminous' request when referring to them.

At my insistence, our firm has, for a number of years, refused to refer to such requests in those terms and refers to them instead as 'unreasonable diversion requests'. Although not a fully accurate summary of the true test to be considered and applied, this label focuses on the effect that processing would have on the resources of an agency, and not on the more arbitrary and narrow notion of sheer volume of documents.

This view has now been recognised to a degree in the practice notes published by the Victorian Department of Justice. Practice Note 6 is entitled *'Voluminous' Requests for Access* and states the following in answer to the question, 'what is a 'voluminous' request?':

> There is no actual mention in the Freedom of Information Act 1982 (FOI Act) of a 'voluminous' request. The term was used in the second reading speech to the Bill which introduced s 25A into the Act in 1993 and has developed over time as a shorthand expression to cover the circumstances where an agency may refuse to process a valid request for access on certain grounds in section 25A. Those circumstances are not confined to sheer volume so the term 'voluminous request' is not strictly accurate and can be misleading.[15]

I encourage all those reading this paper to similarly adopt the language of 'unreasonable diversion requests' when referring to those requests which might fall within the provisions which are the subject of the paper. That way it will help avoiding the unconscious mental trap of focussing improperly on sheer volume of documents rather than the need to focus on the impact processing a request for access would have on the agency's resources.

Impact of technology in Australian cases

Whether requests seek access to hard copy documents or electronically stored information, the principles to be applied are the same.[16]

Particular difficulties created by computerised records were recognised by Deputy President Forgie in the Administrative Appeals Tribunal case of *Langer v Telstra Corporation Ltd*[17] where, after referring to decided cases on the unreasonable diversion provisions, she noted:

> While these considerations remain relevant, electronic storage of e-mails and other computerised records brings with it another set of difficulties. Issues relating to location and retrieval, for instance, require consideration not only in terms of the workload of staff not having experience with the subject matter of the request but in terms of the workload of staff having expertise in the retrieval of computerised records where the officer creating the records is no longer available, or is unable, to retrieve them from his or her computer. The need to consider skilled staff arises from the nature of the medium. Unlike paper files (perhaps with the exception of older archived materials that are more likely to be considered under the Archives Act) that may be located and handled by staff with no special expertise, computer records that are stored and not retrievable simply by searching the files on a particular computer require particular skills.[18]

In my view those comments made by Deputy President Forgie remain valid even though more than 10 years have passed since they were made. The difficulties associated with location and retrieval of electronic documents have been illustrated in subsequent cases.

Backed up emails

In *Re Ford and Child Support Registrar*[19], the Tribunal accepted the evidence that if the search described was required, it would have been a substantial and unreasonable diversion

of resources. In that case the applicant sought, among other things, all emails and other correspondence which referred to the applicant. The evidence was that:

- 77 back up tapes from Melbourne and Perth registries which contained 8,250 GB of information would have to be quarantined and searched.
- the search would require three staff of a particular level of seniority full time for 6 months to examine individual documents.
- it would require further infrastructure and hardware at a cost of over $500,000 (there is no obligation on an agency to expend its funds in obtaining additional equipment in order to satisfy a request for access).[20]

A recent illustration of the problem or difficulty with backups is the case of *The Age Company Pty Ltd v CenITex*.[21] It involved two requests for access made by *The Age* from CenITex.

CenITex is the Victorian Government's Centre for Information Technology Excellence. It was created in 2008 and delivers information and communications technology, infrastructure, application hosting and desktop services to the public sector. As part of its functions, CenITex builds and operates ICT infrastructure for the whole of the Victorian Government. That includes desktop services, internet access services, email and diary services, and backup, storage and disaster recovery services. Its clients are each of the Departments of State and two other statutory authorities.

The requests for access from *The Age* sought many different categories of documents including, most importantly for present purposes:

- for a 21 month period from 1 January 2010, *emails*, letters, memos or summaries of complaints received by CenITex about its contractors and/or contract staff made externally by other departments or within by CenITex VPS staff;
- reports, summaries, briefs, *emails* or memos from the beginning of 2010 for a 22 month period, containing customer feedback results on CenITex services.

There was extensive evidence from CenITex on the difficulties that would be encountered in processing the requests and, in particular, just in retrieving and perusing the emails to determine what was relevant or not.

The Tribunal found in favour of CenITex and accepted that the decision to refuse access on the basis that processing the request would substantially and unreasonably divert the resources of CenITex from its other operations was the correct and preferable decision on the evidence. It accepted that:

- the requests were for an extensive time period (up to 33 months);
- the terms of the request were very broad;
- CenITex would need to go through virtually every email to ascertain whether the email contained a complaint or feedback in order to comply with the obligation to take all reasonable steps to identify all relevant documents. It accepted that this would involve in excess of 1 million emails;
- the location of the documents meant that they would need to be retrieved from an external source;
- the way in which the documents were stored meant that they would need to be recovered from magnetic back up tapes.[22] The emails would then have to be processed on a server and that it would be a time consuming and labour intensive process. The time in restoring and examining the documents would be great;

- the identification, location and collation of the documents requested would be arduous. The checking of the backups would then be substantial and would take many months. The processing of the requests would run into many months rather than weeks;
- the time lines for compliance with a request was another indication of what a reasonable amount of time is to process a request. The Tribunal accepted 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; and
- *The Age* had not taken advantage of the invitation to consult to narrow the request. The Tribunal commented that the refusal by *The Age* to co-operate and limit the terms of the request had not assisted.

For another example where searching backup tapes supported that conclusion that disclosure would substantially and unreasonably divert resources of an agency from the performance of its functions is the Queensland case of *Re Seal and Queensland Police Service*.[23] In that case, the Office of the Information Commissioner determined that part of a request was appropriately refused on this basis. The evidence which was accepted by the Assistant Information Commissioner was that to load and search the backup tapes for the required period before 30 September 2002 back to 1997 would take at least 10 working weeks, which would involve the use of considerable resources.[24]

A similar approach was taken in the case of *Smeaton v Victorian Workcover Authority*.[25] This is one of many cases involving the same parties over a number of years. In that case the applicant had read a previously released email which suggested to him the possibility that there was a further document attached to an email. Based on previous searches conducted by the respondent agency in satisfying requests for access made by the applicant, he formed the view that the only place left to search was the entire WorkCover email database and that the request was a 'voluminous' one. The Tribunal accepted the evidence that:

- to establish whether any documents as requested existed in the respondent's email system require research across the entire Victorian Workcover Authority mail domain. It would require research of the current/live email boxes of current contractors and employees and restoring the archives of past employees (and contractors) so they also may be searched. The search would have to be done at the individual mailbox level.
- the search involved searching each of the individual mailboxes of all VWA personnel over the period 20 months from 1 May 2005 (the start of the referral to KPMG) to 31 December 2006. About 1,200 employees and contractors of the respondent have email inboxes. There is also an unknown number of staff and contractors who have email boxes that have been closed.
- on a conservative estimate, assuming as a minimum it took one hour to consider each existing email box for a period of 20 months, this alone would take 1200 hours.
- the IT contractors were not willing to provide a quote as they thought the job unrealistic.

The Tribunal affirmed the respondent agency decision stating that the correct and preferable decision in this proceeding was obvious.[26]

Amount of information

Some cases have recognised that the existence of large amounts of electronically stored potentially relevant documents is a significant contributing factor to a decision to refuse access on the basis of a substantial and unreasonable diversion of resources.

In *Re Conservation Council of Western Australia Inc and Department of Conservation and Land Management*[27] the applicant sought extensive electronically stored data relating to

calculation of sustainable yields of jarrah forests. An amended request sought, among other things, a list of all jarrah datasets used in the forest management plan and even the *computer program* which runs a particular model from the datasets. The WA Information Commissioner accepted that with the large amount of data, and accessibility issues, an estimate of 240 hours to process the request was not an unreasonable estimate and justified a decision to refuse access on the unreasonable diversion basis.

Another example is *Re Sideris and City of Joondalup*.[28] In that case, in addition to some 500 hard copy documents, there were about 1,000 electronically stored documents comprising approximately 2,000 pages. It was estimated that it would take 65 working days to properly process the request and make a decision. The WA Information Commissioner accepted that the decision to refuse access on the unreasonable diversion basis was correct and affirmed it.

The fact that technology allows recording and storage of a large amount of information, even in relation to a discrete and separate topic, even in a wholly separate database, can also be detrimental if applicants do not submit reasonable requests. For example, in the New South Wales case of *Oliveri v NSW Police Force*,[29] the applicant sought access to the complete and entire case file from the Eaglei police database for a particular operation known as Operation Burkitt. The evidence submitted was that:

- the database was used to capture every single document created as part of the investigation in Operation Burkitt, investigation logs, emails, reports, and administrative and budgetary documents.
- only one very senior officer had access to all documents.
- the Operation ran for about 12 months with up to 30 different officers deployed, 6 of whom were allocated on a full-time basis.
- there were thousands of documents estimated to exist comprising many thousands of pages.
- it would take nearly a month for the officer with full access to print off all relevant documents and a further two weeks time to review and edit the documents.

The Tribunal accepted the evidence and found that processing would have been a 'massive task'. It even concluded that the estimate of time required to process was likely underestimated. It found that processing would constitute a substantial and unreasonable diversion of the agency's resources.

The use and proliferation of email as a means of communication can add a further layer of difficulty. How emails are used, their frequency, and the propensity of people to 'copy in' multiple individuals can also result in massive duplication of documents. That duplication 'does not reduce the task of identifying or sorting them'.[30] It can result in exponential growth in relevant documents having to be waded through, as some individuals forward email chains on to others creating further branches or tracks which need to be pursued during the search process in order to satisfy the search obligation of agencies.

In another *Smeaton*[31] case, the sheer number of emails generated about the subject matter meant that the decision to refuse access on this basis was accepted, not because of the difficulty in locating the documents (and getting a hard copy), but the time taken to deal with over 1,000 pages of material in all the circumstances.

Similarly, but not directly related to a decision to refuse access on the basis of an unreasonable diversion request, it is possible for there to be such 'voluminous' material within electronic sources such as CDs and DVDs which would make the editing of exempt material not practicable and therefore, not required.[32]

Type of technological development

The extent to which technology can impact on a decision to refuse access on the unreasonable diversion basis can depend on the nature of the technological development and the quality of the information stored. For example, in another *Smeaton* case,[33] the existence of an electronic archive index made it possible for the respondent to easily identify that it would need to search 80 archived boxes of documents which might contain relevant documents. There still had to be an estimate of the number of documents and time and effort required for those boxes to be physically searched.

In another case, the fact that the diary of the Prime Minister was kept electronically meant that some processing activities would take *less time*:

> …identifying, locating and collating the documents requested, bearing in mind that the diaries are maintained in an electronic format. Copying and editing should also take only a small amount of time.[34]

Similarly, in the ACT case of *Coe and Chief Minister's Department*[35] the ability to conduct an electronic search of files proved to be of assistance in being able to identify 143 files that would need to be searched to find relevant documents. Those files were identified by dong a search of files at ACT Record Services, an agency of the Department of Urban Services which had the function of archiving and storing all ACT government files. The search was done using particular search terms and related to a request about native title related documents. The Tribunal relied on, among other things, the fact that *there was no suggestion that there would be any difficulty in identifying what documents fell within the request*. However, it is important to note that the statutory test under the ACT FOI Act permitted consideration only of the number and volume of the documents and to any difficulty that would exist in locating or collating relevant documents in the agency filing system.[36]

The development in *technology used to process requests* has also been a contributing factor to decisions to refuse access on the basis that processing would substantially and unreasonably divert the resources of an agency from performing its functions. This is a reference to scanning hard copy documents for the purposes of facilitating the editing or redacting function. This is well illustrated in the Queensland case of *Re Middleton and Building Services Authority*.[37] Although it was not necessarily the determining factor, it was a significant contributor to the decision that the Right to Information Commissioner accepted the following relevant evidence:[38]

- a number of the relevant documents were created prior to June 2008 and are not available electronically; once they were located they would need to be scanned into the Authority's database *for further editing*.
- it takes administrative staff 2.5 hours to prepare and scan 600 documents (it was conservatively estimated that the application would involve processing between 2,500 and 3,000 documents).

The legitimacy of considering the time spent scanning documents has been explained by the Right to Information Commissioner in Queensland as follows:

> the action of 'scanning' documents can in my view be seen as a facet of the act of 'collation'.[39]

Similarly, the capacity for technological advancements to assist the search process may depend to a large extent on what information is stored *and whether or how it may be searched for*. For example for some older stored documents, systems might assist in

searching to identify relevant or potentially relevant *files*, but might not necessarily help to identify *actual documents*.[40] Further, documents might not be stored in a way that permits full text searching, but rather may only permit key words searches used to describe the documents when they were created or stored. As technology progresses, better search capabilities are being developed which may ease this problem.

Not just technology

The fact that documents may be stored electronically will *not necessarily alone* be the reason for a request for access to be refused on the basis that processing would substantially and unreasonably divert resources,[41] but may be a significant contributing factor overall.

This was illustrated in a recent case before the Australian Information Commissioner. In *Davies and Department of the Prime Minister and Cabinet*,[42] the applicant, a journalist with the Sydney Morning Herald, made requests seeking for various periods a copy of the diaries of Prime Minister Gillard and former Prime Minister Rudd. These were maintained as an electronic diary in standard calendar format, with a list of appointments and reminders entered against time slots. There was a mixture of official, party and personal engagements. They were no different to the electronic diaries that many people maintain.[43]

In total there were some 2,000 entries in the diaries. That fact alone was not the cause of the decision to find that a practical refusal reason existed in respect of each of the two requests. The other evidence about the *extensive amount of time and effort that would be required to process each of the entries* was what led the Commissioner to find that a practical refusal reason existed.

It should be noted that different outcomes can result depending on the particular request and the facts of a particular case. This is conveniently illustrated by another case determined by the Australian Information Commissioner on the same day as *Davies*, namely, *Fletcher and Prime Minister of Australia*.[44] The request was for extracts from the diary for a whole year, but only in relation to scheduled meetings between the Prime Minister and one or more of 6 nominated MPs. The time and effort involved in processing the request was considered to be *significantly less* so as to not give rise to a practical refusal reason to not process the request.

Quite ironically, there have even been cases where decisions to refuse on the basis of a substantial and unreasonable diversion of resources have been applied to documents relating to the development of technology.[45]

Impact of technology in overseas cases

After considering what has happened across the various Australian jurisdictions, it is of interest to examine whether similar experiences have occurred in some overseas jurisdictions that may have equivalent provisions.

United Kingdom

In some instances, similar provisions do not necessarily exist in FOI or RTI legislation but in legislation that is subject specific, such as that relating to environmental information.

In the United Kingdom, the *Environmental Information Regulations 2004* (EIR) import the enforcement provisions of the *Freedom of Information Act 2000* (UK). Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that a request for access is 'manifestly unreasonable'. That term is not defined. However, the

UK Information Commissioner considers that a request may be deemed manifestly unreasonable where, among other things, *complying with the request would be an unreasonable diversion of resources*.[46] There must be an obvious, clear or self-evident quality to the unreasonableness.[47]

In the case of *Re Queens University Belfast*,[48] the applicant sought tree ring dating data from the University. The University was one of the world's leading centres for tree ring dating research. The request was for data stored electronically about some 11,000 individual tree samples. The data was stored on 67 floppy discs which contained 150 folders of relevant data. The UK Information Commissioner established that it took on average about 5 minutes to transfer data folder to data folder using the Notepad program. Therefore, it would only take 12.5 hours to transfer all the data and make a copy. The fact that the data might be meaningless or could not be put to any meaningful purpose was irrelevant. The Commissioner concluded that the request was *not* manifestly unreasonable.[49]

There is an EU Directive from which the EIR originate.[50] An implementation guide to a relevant UN convention which refers to the 'manifestly unreasonable' test provides that there must be more than volume and complexity, as those things alone do not make the request manifestly unreasonable.[51]

Perhaps strangely, the Information Commissioner has found that under the EIR an agency would not be able to take into account the time it took to redact certain information in establishing the reasonableness of a request.[52]

Recent jurisprudential developments referred to later show that these provisions are almost indistinguishable from UK *FOI Act* provisions and that both are quite close to the Australian provisions.

UK FOI Act

The Australian jurisdictions focus on the impact that processing a request for access would have on the resources of an agency. The UK *Freedom of Information Act 2000* (*FOI Act*) appears at first glance to be quite different. It does not have a similarly worded provision, but rather two separate provisions which provide separate but related bases on which a request for access may be refused without processing.

Section 12

The first focuses on the cost of complying with a request for access. Section 12 of the UK Act exempts a public authority from the obligation to provide information if the cost of complying with the request would exceed an appropriate limit. The appropriate limit and how it is to be calculated is set out in relevant regulations.[53] The relevant regulations make it clear that in estimating the cost of complying with the request, the public authority may only take into account costs reasonably expected to be incurred in:

(a) determining whether it holds the information;
(b) locating the information, or a document which may contain the information;
(c) retrieving the information, or a document which may contain the information; and
(d) extracting the information from a document containing it.

To the extent that the cost of doing those things involves estimating time which persons undertaking those activities are expected to spend on those activities, the cost is to be estimated at £25 per person per hour. The appropriate limits are £600 for central government public authorities (such as Departments) and £450 for most other public

authorities. The estimates must be arrived at on a reasonable basis. They must be sensible, realistic and supported by cogent evidence. [54]

In the Information Tribunal case of *Fitzsimmons v Information Commissioner*[55] the request for information sought details of certain approved expenses of two staff of the BBC. The Information Commissioner had upheld the BBC's reliance on s 12 of the UK *FOI Act* to refuse to comply with the request. On appeal to the Information Tribunal the evidence was that there were both electronic and manual expense claims. Part of the search would be to use an electronic database or computer system to review payments to the staff members during the period, note the date and number of the invoice referred to and then go to the hard copy source.

The Tribunal accepted that the estimated costs for the online expense claims, including further significant work which would be required in relation to those online electronic expenses, in conjunction with the work for the manual expenses, would clearly take the hours of work required well over the 18 hours which would have given rise to the £450 appropriate limit. The Tribunal was satisfied that estimate was sufficiently reliable to conclude it was reasonable and the conclusion was that the BBC was entitled to rely on s 12 to not comply with the request.

In another very recent example, the applicant sought from a local council emails and attachments on the subject of 20 mph speed limit schemes from January 2010 to July 2012. Access was refused on the basis of s 12. The evidence was that there were 47 individuals whose emails would have to be checked. The evidence, based on a sample, was that it would take about 8 hours per person to locate, retrieve and extract the information sought which would have cost £9,400.[56] The Information Commissioner seemed to be a bit sceptical of the estimate, but concluded that even allowing that it may take all the individuals 1 hour to carry out a search, that would still take it beyond the appropriate statutory limit.[57]

A decision by the UK Information Commissioner in March 2013 illustrates very well the potential for the volume of emails that officers get on a day to day basis and the difficulties associated with searching can result in refusal decisions on the basis of internal cost. In *Re Department of Work and Pensions*,[58] the applicant sought copies of emails sent and received by a named Higher Executive Officer at the Department on the subject matter Universal Jobmatch and an organisation called Monster Worldwide, for 2 months (49 working days). Remember, the appropriate limit to process a request for a Department is £600.

The (cogent and reasonable) evidence was as follows:

(a) To locate all the emails, the individual would have to search:
- Microsoft Outlook Inbox, sent items and 37 Microsoft Outlook Data Files (.pst folders)
- 6 folders and sub-folders with the 'My Documents' heading on his computer; and
- Shared folders and sub-folders within a particular project server space (of which there were more than 4,000).

(b) A search of the Outlook folders for the relevant date period would have to be by reference to the names of 10 individuals at Monster with whom he was in regular contact.

(c) A sample was done for a randomly selected day within the date range which yielded 21 emails and the search and collation took 40 minutes (0.67 hours). Over a 49 working day period, that would take 32.67 hours.

(d) Further details of searches required and time estimates were provided which culminated in a cost estimate of £1,311.75 (52.47 hours x £25 per hour).

The UK Information Commissioner accepted that s 12 was correctly applied to enable the Department to refuse to comply with the request.

Section 12 of the UK *FOI Act* provision has also been used to refuse access to information which exists electronically on an ongoing basis, but where the information sought was as at a particular past point in time (which would require manual reconstruction or searches because of search limitations inherent in the database) going well beyond the appropriate limit.[59]

In relation to difficulties associated with searching backed-up emails, the position gets quite interesting in the UK. In one case, the estimated time to search for hard copy documents, electronic folders of documents and emails (not backed up) was *less* than the time which would result in the statutory maximum being reached to enable s 12 to be properly claimed to refuse to comply with a request. However, a further 15.5 to 16.5 hours were included in the agency's estimate in relation to restoration and searching of backed up emails which may have been deleted over the relevant period. That would have clearly taken the search time (and resultant cost) over the statutory limit.

Interestingly, however, the UK Information Commissioner is of the view that information contained on a backup is **not** information 'held' by a public authority for the purposes of the UK *FOI Act*. This is because the main purpose of backup is *disaster recovery* and generally, a public authority will have no intention of accessing information on a backup. However, where such information on a backup is used as an *archive facility*, only then is the information to be treated as being 'held' for the purposes of the UK *FOI Act*. If the only reason to retrieve such 'archived' information is to respond to a request, only then could the cost be included in the estimate in considering whether the statutory limit was reached under s 12.[60]

Section 14

The second provision is s 14 of the UK *FOI Act*. It provides that a public authority is not obliged 'to comply with a request for information if the request is vexatious.' There have been some UK decisions in January 2013 which appear to bring the interpretation of s 14 into much closer alignment with the test that is applied in Australia.

The following important points arise in relation to s 14 of the UK *FOI Act*:

(a) It has been held that a request that would be 'manifestly unreasonable' under r 12(4)(b) of the EIR would be 'vexatious' under s 14 of the UK *FOI Act*. The meaning of the two expressions is essentially the same; there is in practice no material difference between the two tests, and the same sorts of considerations should apply.[61]
(b) The whole purpose of s 14 (and of r 12(4)(b) of the EIR) was to protect public authorities' resources (in the broadest sense of that word) from exposure to a disproportionate burden in handling information requests, and from being squandered on disproportionate use of FOI.[62]
(c) There is no reason why excessive compliance costs alone should not be a reason for invoking s 14 (just as it may be done under r 12(4)(b) of the EIR) whether it is a 'one off' request or one made as part of a course of dealings.[63]

In the light of these recent decisions, the UK Information Commissioner has suggested in a 'guidance' note published in May 2013 that public authorities should not regard s 14 as something which is only to be applied in the most extreme circumstances, or as a last resort. Rather, authorities are encouraged to consider its use in any case where they believe the

request is disproportionate or unjustified.[64] More particularly, s 14 has been summarised as being 'designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a **disproportionate** or **unjustified** level of disruption, irritation or distress.'[65]

Since the recent UK decisions in January 2013, there have been no cases which I have been able to locate or identify where technology had any significant role to play in relation to any decision to refuse access on the basis of it being vexatious under s 14.[66]

Scotland

Similar provisions exist in the *Freedom of Information (Scotland) Act 2002* (*FOI Act*)[67] and *Freedom of Information (Fees for Required Disclosures) (Scotland) Regulations 2004*[68] and similar outcomes have been reached to those in the UK. See the following for examples in decisions of the Scottish Information Commissioner:

- *Attridge v Lothian Health Board*[69]where the request was for (in Excel spreadsheet format) a list of all individual invoices over the sum of £500, listed by company or organisation name, invoice date, transaction amount, transaction description and the date paid by NHS Lothian, for the financial years 2009/10, 2010/11 and 2011/12. Section 12 applied.
- *Francis v Scottish Ministers*[70] where the request for all legal advice on a particular broad topic would require extensive searches of electronic files. Section 12 applied.
- *Mr V v Aberdeen City Council*[71] extensive searches of 5 years of electronically stored reports would be required which alone took the cost beyond the appropriate limit. Section 12 applied.[72]
- *Mr Q v Scottish Prison Service*[73] where a prisoner disgruntled with lateness of mail sought information from CCTV footage to see when the mail was collected. It was found relevant in determining the request was vexatious under s 14 of the Scottish FOI Act that the data would have to be transferred from hard drive to a disc, then reviewed to protect privacy and some pixilation introduced, it was a technical task to be outsourced under supervision of a suitably senior manager (given the length and sensitivity of the footage).

Ireland

The provisions in the *Freedom of Information Act 1997* (Ireland) (*FOI Act*) are a little closer to those in the Australian jurisdictions, or at least to the original form of the Commonwealth *FOI Act* and the *Freedom of Information Act 1989* (ACT) provisions. There is a connection to the number of documents or records.

Section 10(1)(c) of the Irish *FOI Act* provides that a request for access can be refused if granting would, 'by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned'. In the case of *Ms XX and Health Service Executive*[74] the applicant, after consultation to narrow an even broader request, sought access to the number of staff in the administrative grades from grade 4 up who received incremental credit awarded for various service for the years 2001 to 2009 in the Hospitals and Community Care Centres of the respondent. Although, at the request of the Irish Information Commissioner, a list of all 400 or so staff who provided services could be prepared, a record which would meet the Applicant's requirements did not actually exist but it was possible for the public body to compile a record

of information sought from data available in *a combination of the agency's IT and manual systems*.

That list would have to be cross referenced with those who received incremental credit and each individual HR file would have to be retrieved to ascertain the basis on which the incremental credit was awarded to see if it was the basis of interest to the applicant. The Information Commissioner could see no basis on which to dispute the assertion of the respondent that the retrieval and examination of such records and the staff time necessary to search through a large number of records and establish whether or not incremental credit was awarded on the correct basis would cause substantial and unreasonable interference with the respondent agency's work. The basis for refusal was considered justified.

As with some of the Australian cases, this is an instance where the existence of technology only provided part of the solution and resort still had to be made to hard copy records.

This difficulty in the transition or interaction between hard copy records and electronically stored records and how that impacts on unreasonable diversion decisions is further illustrated in the Irish case of *X and Western Health Board*.[75] In that case from 2000, the applicant sought records giving a detailed breakdown of payments made under a particular welfare scheme. The agency's records commenced to be computerised in 1998. It could not produce a computerised listing of cases by name, except in relation to the most recent month. It was able to (and did) provide historical information on numbers, but not the details sought by the applicant without going back to hard copy records. The Information Commissioner described that as requiring 'considerable time and expense' if that was to be done and considered that to require that would be a substantial and unreasonable interference with the respondent's other work.

Similar problems with technology can be experienced when data is stored and resultant graphical representations of it prepared on an ongoing basis and an applicant seeks the data of a graphical representation which existed at a past point in time.[76]

CONCLUSIONS

In my view, there are both positive and negative aspects associated with the development of technology insofar as it may impact on the processing of requests for access.

On the positive side:

(a) developments in technology can facilitate the identification or location of potentially relevant documents or files. These include:
    (i) electronic archive indexes;
    (ii) electronic document management systems with varying (but ever improving) search capabilities;
    (iii) increased full text search capability for stored documents.
(b) the development of electronic scanning and associated software has facilitated the collation and editing (or redacting) of documents for greater practicability of at least partial access.

On the negative side:

(a) the ability or capacity of an agency to locate or retrieve certain computerised records can be limited by only few staff having the particular skills to be able to do it;

(b) the need to search backup tapes, which may have to be physically retrieved, restored and searched by skilled staff or contractors, can take very large amounts of time, effort and resources (including equipment needed for other usual purposes);
(c) computer technology development and proliferation in use has facilitated the creation of vast amounts of information by government agencies which may be held electronically and/or in hard copy, with a growing propensity for computer storage. That fact alone is not negative, but the time taken to identify and then trawl through those documents with a view to redacting exempt or irrelevant information is proportionately increased with the growth in document generation. This is increased by the use and proliferation of email as a means of communication within government agencies.

The cases reviewed from overseas jurisdictions support the conclusion that the experience overseas has been relatively consistent with the Australian experience. This is despite the difference in tests used between jurisdictions. The same types of difficulties and processing limitations or restrictions arising from technological development have been experienced in overseas jurisdictions.

The type of issues experienced overseas also include the fact that multitudes of emails are generated and may potentially be relevant to requests, which means they have to be located, retrieved and examined (including from backup sources).

The combination of the above suggests that:

(a) technology has made a significant impact in that refusal of access decisions on the unreasonable diversion ground are more likely;
(b) this might be lessening as knowledge of technology and search capabilities improve within agencies;
(c) ultimately the outcome might depend on the ability of agencies and applicants to work together to narrow the scope of requests once the difficulties faced become apparent.

APPENDIX 1: Australian legislation extracts

Commonwealth – Freedom of Information Act 1982

Section 24(1) – 1982 to 1991

> (1) Where –
>
> (a) a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter; and
>
> (b) the agency or Minister dealing with the request is satisfied that, apart from this sub-section, the work involved in giving access to all the documents to which the request relates would substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his functions, as the case may be, having regard to the number and volume of the documents and to any difficulty that would exist in identifying, locating or collating the documents within the filing system of the agency or of the office of the Minister, the agency or Minister may refuse to grant access to the documents in accordance with the request without having caused those processes to be undertaken.

Section 24(1) – between 1991 and 2010

(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; or
  (b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.

Section 24 and Section 24AA – post 2010 amendments

24 Power to refuse request—diversion of resources etc.

(1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
  (a) must undertake a request consultation process (see section 24AB); and
  (b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.

(2) For the purposes of this section, the agency or Minister may treat 2 or more requests as a single request if the agency or Minister is satisfied that:
  (a) the requests relate to the same document or documents; or
  (b) the requests relate to documents, the subject matter of which is substantially the same.

24AA When does a *practical refusal reason* exist?

(1) For the purposes of section 24, a ***practical refusal reason*** exists in relation to a request for a document if either (or both) of the following applies:
  (a) the work involved in processing the request:
    (i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
    (ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions;
  (b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).

Victoria – Freedom of Information Act 1982

25A Requests may be refused in certain cases

(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; or

(b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.

***New South Wales – Freedom of Information Act 1989* (repealed)**

25 Refusal of access

(1) An agency may refuse access to a document:

(a1) if the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions

New South Wales – Government Information (Public Access) Act 2009

60 Decision to refuse to deal with application

(1) An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason):

(a) dealing with the application would require an unreasonable and substantial diversion of the agency's resources,

Queensland – Freedom of Information Act 1992

29 Refusal to deal with application—agency's or Minister's functions

(1) An agency or Minister may refuse to deal with an application for access to documents or, if the agency or Minister is considering 2 or more applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—

(a) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or

(b) interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.

Queensland – Right to Information Act 2009

41 Effect on agency's or Minister's functions

(1) An agency or Minister may refuse to deal with an access application or, if the agency or Minister is considering 2 or more access applications by the applicant, all the applications, if the agency or Minister considers the work involved in dealing with the application or all the applications would, if carried out—

(a) substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions; or

(b) interfere substantially and unreasonably with the performance by the Minister of the Minister's functions.

Australian Capital Territory – Freedom of Information Act 1989

23 Requests may be refused in certain cases

(1) An agency or Minister may refuse to grant access to documents in accordance with a request without processing the request if—

(a) the request is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and

(b) the agency or Minister is satisfied that the work involved in giving access to all documents to which the request relates would substantially and unreasonably—

(i) divert the resources of the agency from its other operations; or

(ii) interfere with the performance by the Minister of his or her functions.

Tasmania – Freedom of Information Act 1991 **(Repealed)**

20 Requests may be refused in certain cases

(1) If –

(a) a request for information is expressed to relate to –

(i) all information of a specified kind; or

(ii) all information in respect of a specified subject-matter; and

(b) the agency or Minister dealing with the request is satisfied that the work involved in providing the information requested –

(i) would substantially and unreasonably divert the resources of the agency from its other work; or

(ii) would interfere substantially and unreasonably with the performance by the Minister of the Minister's other functions –

having regard to –

(iii) the amount of that information; and

(iv) any difficulties that exist in identifying, locating or collating the information within the records of the agency or of the office of the Minister –

the agency or Minister may refuse to provide the information without undertaking the processes referred to in paragraph (b)(iv).

Tasmania – Right to Information Act 2009

19 Requests may be refused if resources unreasonably diverted

(1) If the public authority or Minister dealing with a request is satisfied that the work involved in providing the information requested –

(a) would substantially and unreasonably divert the resources of the public authority from its other work; or

(b) would interfere substantially and unreasonably with the performance by that Minister of the Minister's other functions –

having regard to –

(c) the matters specified in Schedule 3–

the public authority or Minister may refuse to provide the information without identifying, locating or collating the information.

South Australia – Freedom of Information Act 1991

18 Agencies may refuse to deal with certain applications

(1) An agency may refuse to deal with an application if it appears to the agency that the nature of the application is such that the work involved in dealing with it within the period allowed under section 14 (or within any reasonable extension of that period under section 14A) would, if carried out, substantially and unreasonably divert the agency's resources from their use by the agency in the exercise of its functions.

Western Australia – Freedom of Information Act 1992

20. Agency may refuse to deal with application in certain cases

(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.

Northern Territory – Information Act 2000

25 Refusing access because providing access unreasonably interferes with operations

(1) A public sector organisation may decide to refuse access to the information because providing access would unreasonably interfere with the operations of the organisation.

(2) A public sector organisation may only decide to refuse access under subsection (1) if the organisation and the applicant are unable to agree on a variation of the information identified in the application.

APPENDIX 2: International legislation extracts

United Kingdom – Freedom of Information Act 2000

1 General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled–

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

12 Exemption where cost of compliance exceeds appropriate limit

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) 'the appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority–

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

United Kingdom - Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

The appropriate limit

3(1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request – general

4(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or
(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,
(b) locating the information, or a document which may contain the information,
(c) retrieving the information, or a document which may contain the information, and
(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

Scotland - Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

…

(6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

Scotland - Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

(1) In these Regulations, 'projected costs' in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.

(2) In estimating projected costs-

(a) no account shall be taken of costs incurred in determining-

(i) whether the authority holds the information specified in the request; or

(ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and

(b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount
The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

Ireland – Freedom of Information Act 1997

10.—(1) A head to whom a request under section 7 is made may refuse to grant the request if—

…

(c) in the opinion of the head, granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned,…

(2) A head shall not refuse, pursuant to paragraph (b)…of subsection (1), to grant a request under section 7 unless he or she has assisted, or offered to assist, the requester concerned in an endeavour so to amend the request that it no longer falls within that paragraph.

Endnotes

1 The quote has been taken from the FOI Man blog and refers to the operation of the vexatious application provisions of the UK *FOI Act* referred to further below. The quote available at http://www.foiman.com/archives/category/freedom-of-information-act/vexatious as at 12 July 2013.
2 See http://www.youtube.com/watch?v=CSe38dzJYkY.
3 Technology per se extends beyond computer technology; however, given the nature of FOI/RTI legislation, the focus of this paper will be on computer technology.
4 An extract of the relevant provisions for each Australian jurisdiction (including some repealed provisions) appears in **Appendix 1** to this paper.
5 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 August 1981.
6 See for example *Re Shewcroft and Australian Broadcasting Corporation* [1985] AATA 42; *Re Timmins and National Media Liaison Service* [1986] AATA 23 at [22] and [24]; *Re Cullen and Australian Federal Police* [1991] AATA 671 at [11]; *Re Coe and Chief Minister's Department* [2006] ACTAAT 8.
7 See for example *Re Maksimovic and Australian Federal Police* [2008] AATA 537 at [8] and [35].
8 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, Vol 412, 1738. The Legal and Constitutional Committee Report referred to made recommendations in terms of 'voluminous requests' see *Wright v SECV* [1998] VCAT 162.
9 *Luck v Victoria Police* [2013] VCAT 206; *Colefax v Department of Education and Communities (No.1)* [2013] NSWADT 42 at [40]; *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550; *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1551; *AB v Department of Education* [2012] VCAT 1233 at [40]; *Altaranesi v Sydney South West Area Health Service* [2011] NSWADT 43 at [71]; *Geelong Community for Good Life Inc v Environment Protection Authority & Anor* [2009] VCAT 2429 at [5]; *Re Mineralogy Pty Ltd v Department of Industry and Resources* [2008] WAICmr 39; *XYZ v Victoria Police* [2007] VCAT 1686; *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137; *Kelly v Department of Treasury and Finance* [2001] VCAT 419; *Mildenhall v Department of Education* (Unreported, VCAT, 19 April 1999) at [30]; *A v Department of Human Services* [1998] VCAT 299; *Re Hesse and Shire of Mundaring* [1994] WAICmr 7.
10 See for example *Re Maksimovic and Australian Federal Police* [2008] AATA 537 at [8] and [35]; *The Age Company Pty Ltd v CenITex* [2012] VCAT 1523.
11 *The Age Company Pty Ltd v CenITex* [2012] VCAT 629.
12 *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [48] – '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.'
13 *Heffernan and Australian Nuclear Science and Technology Organisation* [2013] AICmr 25 at [27].
14 See for example *Philip Morris Ltd and Department of Health and Ageing* [2013] AICmr 49; *T and Australian Securities and Investments Commission* [2013] AICmr 33; *Davies and Department of Prime Minister and Cabinet* [2013] AICmr 10.
15 Available at

http://www.foi.vic.gov.au/home/for+government+agencies/practice+notes/practice+note+06+voluminous+requests+for+access#1 as at 11 June 2013. FOI Solutions was retained to draft most of the Department's practice notes including this one.

16 *Langer v Telstra Corporation Ltd* [2002] AATA 341 at [111] 'the principles expressed in [the cases] are applicable whatever the medium.'

17 [2002] AATA 341 at [116].

18 In that case the Tribunal found that processing would have involved individual checking of each message after being processed on a server standing apart from the network system and that it would be a very time consuming and labour intensive process. 'I am satisfied that the workload involved in checking individual computers and the back up tapes would be substantial.' (Id at [117]-[118]).

19 [2007] AATA 1242.

20 *Radicic v Australian Postal Corporation* (2000) 59 ALD 157, 159 per Branson J. See also *Re Macdonald and City of Joondalup* [2006] WAICmr 2 where there were approximately 900 electronic 'documents' sought. The decision to refuse on the unreasonable diversion basis was upheld.

21 [2012] VCAT 1523.

22 For a case on whether retrieving information from back-up tapes is required on the basis that it is not done from computer equipment ordinarily available to an agency, see *Smeaton v Victorian Workcover Authority* [2012] VCAT 521. As to when it is necessary to produce a written document from information stored on computer see s 19, Vic FOI Act and *Halliday v Corporate Affairs* (1991) 4 VAR 327; s 17, Cth *FOI Act* and *Re Collection Point Pty Ltd v Commissioner of Taxation* [2011] AATA 909.

23 (Unreported, 29 June 2007, No. 2005 F0619 available as at 25 June 2013 at http://www.oic.qld.gov.au/__data/assets/pdf_file/0012/7050/2005-F0619-Dec-26-06-07.pdf.

24 See also Re Luc and Department of Health (Unreported, 28 June 2000, No. 1999/S0204) available as at 25 June 2013 at http://www.oic.qld.gov.au/decisions/luc-and-department-of-health.

25 [2012] VCAT 1551.

26 For another case in which the difficulties in searching older backed up emails resulted in a successful refusal to grant access on this basis see *Smeaton v Victorian Workcover Authority* [2013] VCAT 591.

27 [2005] WAICmr 5.

28 [2008] WAICmr 1.

29 [2010] NSWADT 299.

30 *Altaranesi v Sydney South West Area Health Service* [2011] NSWADT 43, [75].

31 *Smeaton v Victorian Workcover Authority* [2012] VCAT 1236. Some of the relevant circumstances included the fact that the applicant had already made over 50 FOI requests to the agency, the number of pages of material was by way of a preliminary search, an estimate of 160 hours to process the request over many weeks, processing would be unlikely to further the public interest, processing would place unreasonable demands on the FOI Unit which receives about 2,000 requests per annum, the applicant was on a fishing expedition and did not assist by narrowing the request.

32 See for example *Re Maksimovic and Australian Federal Police* [2008] AATA 537 at [35].

33 *Smeaton v Victorian Workcover Authority* [2012] VCAT 150.

34 *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10 at [40]; See also *Fletcher and Prime Minister and Cabinet* [2013] AICmr 11.

35 [2006] ACTAAT 8

36 Which was how the original version of the Cth FOI Act test was stated before amendment in 1991.

37 [2010] QICmr 39.

38 At [26] and [32].

39 *Re Mathews and University of Queensland* [2011] QICmr 45 at [34], fn 19.

40 See examples in *Chand v RailCorp* [2009] NSWADT 44, [42]-[43]; *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137, [21].

41 Or in the case of a Minister, interfere with the performance of the Minister's functions.

42 [2013] AICmr 10.

43 Id at [32]-[33].

44 [2013] AICmr 11. For further examples where an electronic diary was involved in a decision to refuse access because it would divert a substantial and unreasonable portion of the agency's resources from its other operations, see: *Re Ravlich and Minister for Energy; Training and Workforce Development* [2010] WAICmr 10; *Re Ravlich and Deputy Premier; Minister for Health; Indigenous Affairs* [2010] WAICmr 11; *Re Ravlich and Attorney General; Minister for Corrective Services* [2009] WAICmr 17, [39]-[44].

45 See for example *Re Allanson and Queensland Tourist and Travel Corporation* [1997] QICmr 20 which involved a request for tens of thousands of documents relating to the development, use, retailing, licensing, management and sale of a computer program developed by employees of the respondent as a reservation system for use in the travel industry.

46 *Re Queen's University Belfast* (29 March 2010, FS50163282) available at: http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FS_50163282.PDF as at 11 July 2013.

47 *Re Environment Agency* (30 September 2010, FER0253026) available at http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FER_0253026.PDF as at 11 July 2013.

48 (29 March 2010, FS50163282) available at: http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FS_50163282.PDF as at 11 July 2013.

49 Id at [43]-[46].

50 EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC) available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML as at 11 July 2013 – Article 4(1)(b) enables a request for environmental information to be refused if the request is 'manifestly unreasonable'. That should be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure (Article 4(2).

51 United Nations, *The Aarhus Convention: An Implementation Guide*, 2000 at p 57 (available at http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf as at 11 July 2013. See also *Re Environment Agency* (30 September 2010, FER0253026) at [43] available at http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FER_0253026.PDF as at 11 July 2013.

52 *Re Environment Agency* (30 September 2010, FER0253026) at [50] available at http://www.ico.org.uk/~/media/documents/decisionnotices/2010/FER_0253026.PDF as at 11 July 2013.

53 Relevant extracts of the UK Act and the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (UK) appear at Appendix 2 of this paper.

54 Of course, a public authority does not have to rely on s 12; it is free to comply with a request even if the estimated cost of doing so exceeds the statutory appropriate limits: *Fitzsimmons v Information Commissioner* [2008] UKIT EA 2008 043, [23] and [30] at http://www.bailii.org/uk/cases/UKIT/2008/EA_2008_0043.html as at 11 July 2013.

55 [2008] UKIT EA 2008 043 (at http://www.bailii.org/uk/cases/UKIT/2008/EA_2008_0043.html as at 11 July 2013.

56 47 individuals x 8 hours = 376 hours x £25 = £9,400.

57 *That is, 47 individuals x 1 hour = 47 hours x £25 = £1,175: Re West Sussex County Council (7 May 2013, FS50469852) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50469852.pdf as at 13 July 2013.*

58 (11 March 2013, FS50471803) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50471803.pdf as at 13 July 2013. For another example, see *Re Isle of Wight Council* (11 March 2013, FS50461554) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50461554.pdf as at 13 July 2013.

59 *Re Ministry of Justice* (26 March 2013, FS50467125) at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50467125.pdf at 13 July 2013.

60 *Re Carmarthenshire County Council* (27 March 2013, FS50461626) at [28]-[30] at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50461626.pdf as at 13 July 2013.

61 *Craven v Information Commissioner and Department of Energy and Climate Change* [2012] UKUT 442 (AAC), [22], [30], per Judge Wikeley.

62 Id, [23]; *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC), [10].

63 Id, [31]. The Upper Tribunal did say, however, that if the public authority's principal reason or sole reason for wising to reject the request concerns the projected costs of compliance, as a matter of good practice serious consideration should be given to applying s 12 alone rather than s 14 in the FOI context – this would not be available in the EIR context where no separate cost basis exists. See also *Independent Police Complaints Commissioner v Information Commissioner* [2012] UKFTT 2011_0222 (GRC), [15] available at http://www.bailii.org/uk/cases/UKFTT/GRC/2012/2011_0222.html (at 13 July 2013).

64 Information Commissioner's Office, *Dealing with vexatious requests (section 14)*, [11] available at http://www.ico.org.uk/for_organisations/freedom_of_information/guide/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx as at 13 July 2013.

65 Id, [9], [20].

66 In *The Common Council of the City of London (Ref: FS50469440)* (23 April 2013) available at http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50469440.pdf as at 13 July 2013 the fact that hard copy and electronic records of many people would have to be searched and it was estimated would take one officer a week was one of many relevant factors.

67 With a maximum limit of £600.

68 At an hourly rate of £15.

69 (24 June 2013, 115/2013) at http://www.itspublicknowledge.info/uploadedFiles/Decision115-2013.pdf at 13 July 2013.

70 (29 May 2013, 099/2013) at http://www.itspublicknowledge.info/uploadedFiles/Decision099-2013.pdf at 13 July 2013.

71 (22 April 2013, 075/2013) at http://www.itspublicknowledge.info/uploadedFiles/Decision075-2013.pdf at 13 July 2013.

72 See also *Okasha v Scottish Ministers* (26 March 2013, 055/2013) at [65] where the electronic search alone took the matter beyond the appropriate statutory limit.

73 (1 August 2012, 127/2012) at http://www.itspublicknowledge.info/uploadedFiles/Decision127-2012.pdf at 13 July 2013.

74 [2010] IEIC 090231.

75 [2000] IEIC 24.

76 See *Mr X and Department of Communications, Energy and Natural Resources* [2011] IEIC 080184.