

From the Executive Director...

The Office of the FOI Commissioner of Victoria has now been in operation for just over 1 year. Many clients reported teething problems, which have reduced significantly. However, our experience has been that some agencies have felt uncertain of what to do and what to expect in their dealings with the FOI Commissioner. They are unsure of their rights in such dealings. We have developed a training session on agency rights under the FOI Act which addresses this and other expectations agencies should have when dealing with FOI requests and reviews. See the "Training" tab on our website for more information.

MICK BATSKOS



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Recent Cases

Katz v Victoria Police [2013] VCAT 2046

In *Katz v Victoria Police*, the applicant was arrested and charged with two counts of criminal damage to property. The charges were eventually withdrawn. The applicant then applied for access to the brief of evidence relating to the criminal charges brought against him, including CCTV footage. Victoria Police argued that the CCTV footage was exempt from access under s 33.

The Tribunal found that the footage disclosed information relating to the personal affairs of the people appearing in it. However, the Tribunal decided that the disclosure of the footage was not unreasonable for a number of reasons:

- The applicant sought access to the footage to determine the possibility of success in potential civil proceedings;
- The footage was external security footage recorded at a public venue and did not contain sensitive material. It would accordingly not cause embarrassment to any individuals;

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Recent Cases continued...

- It was not likely that the released footage would be widely distributed or “go viral” on social media;
- There was nothing inherently personal or confidential in nature in the images of the people depicted;
- The views of the individuals were not ascertained under s 53A
- The footage was a few years old and was only relevant to the applicant.

For these reasons, the Tribunal set aside Victoria Police’s decision and granted the applicant access to the footage.

Zeqaj v Victoria Police [2013] VCAT 2105

Victoria Police executed a search warrant on a house and made video and photographic recordings of the outside and inside of the house. This footage contained images of the complainants’ family, their bedrooms, their belongings, and the police locating and seizing certain items. The complainants argued that Victoria Police breached their privacy by creating this footage, and

sought the destruction of the footage, the return of the seized items and compensation for the costs associated with the proceedings.

The Tribunal found that none of the Information Privacy Principles were breached, and accordingly the complaints were dismissed. The reasons for this conclusion are summarised below:

- The collection of evidence was reasonable and ancillary to the execution of the search warrant (IPP 1.1). It was clearly aimed at the property covered by the warrant, rather than the family members.
- The video recording was lawful, fair and not unreasonably intrusive (IPP 1.2). The occupants of the house all knew that the recordings were taken place and could have removed themselves from the recording.
- The footage could not be destroyed (IPP 4). The Tribunal found that s 19 of the *Public Records Act*, which makes it unlawful to destroy a public record other than in accordance with a standard made under s 12 of the *Public Records Act*, applied in this case. Accordingly, as the material was still required for a purpose, it needed to be retained and not destroyed.

Recent Updates

Privacy Law Reform

On 12 March 2014, the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth.) and *Privacy Regulation 2013* will come into effect. As a result, federal privacy law will be reformed greatly. There are a number of changes that will apply from 12 March 2014:

- Australian Privacy Principles are introduced, replacing the existing Information Privacy Principles and National Privacy Principles; and
- Enhanced powers for the Australian Information Commissioner; and
- Changes to credit reporting laws; and
- Recognition of external dispute resolution schemes for privacy-related complaints

For more information and detail on these changes, visit the Office of the Australian Information Commissioner’s dedicated webpage at <http://www.oaic.gov.au/privacy/privacy-act/privacy-law-reform>.

Trends in VCAT decisions

FOI Solutions recently conducted a training session looking at notable trends in VCAT FOI decisions in 2013. The following questions were considered by the VCAT in those decisions:

- When is a search for documents not thorough enough? When is it too thorough?
- When should you consider editing under s 25 of the FOI Act?
- Who has jurisdiction to review a decision made outside the 45 day statutory timeframe?
- When is an agency engaged in ‘trade or commerce’ under the FOI Act?
- Can diversion of an agency’s resources be ‘substantial’ yet not ‘unreasonable’?
- How much information does an applicant need in order to narrow the scope of their request?
- When is the exempt nature of documents apparent from the request?

Question time

Q: We have received a privacy complaint about an issue that happened several years ago. Many staff have left since that time and we're not sure we can find all the material to respond to the complaint. We're worried the complainant will go to the Privacy Commissioner.

A: Whether or not staff have left your organisation, you should consider whether complaints have substance to them as this helps an organisation to improve its practices. It may be useful however to keep in mind that while a complaint can be made about something that happened some time ago, if a complaint is then made to the Privacy Commissioner, the complaint may be declined if the complainant was aware of the act about which he or she is complaining for more than 45 days. This is not an option for an agency, but can be considered as a part of an agency's risk management.

Q: We have recently started to consider the new protected disclosure regime. We thought we could meet the changes by updating our Whistleblower Procedures. Another agency has just been telling me that they made significant changes to their procedures - is this right?

A: The new protected disclosure regime is quite different to the old Whistleblower system. The Independent Broad-based Anti-corruption Commission ("IBAC") has produced guidelines that the legislation requires agencies to follow in their procedures, even if your agency cannot accept protected disclosures. These new requirements will not be met by making changes to your agency's old whistleblower procedures. We can assist you with understanding whether your agency can accept protected disclosures or not, finalising your procedures and providing other more specific legal advice. The due date for procedures was 9 August 2013. However, if your agency has not kept up to date with these changes, we can help.

Firm News

Farewell to Sarah Roughead

Sarah left FOI Solutions at the end of December 2013. She has brought much warmth, laughter and enjoyment to the firm during her time as a law clerk at FOI Solutions. Her research, communication and administration skills, as well as her fine work ethic, will be greatly missed. Sarah recently completed her Bachelor of Laws/Arts at Monash University and will be commencing employment as a graduate at a private law firm in 2014. We wish Sarah all the best for her future endeavours and thank her for her exemplary contribution to FOI Solutions.

New website

In 2014, FOI Solutions will be releasing an all-new website, revamping our current website. We would love to hear any feedback you have as to improvements we can make to our current website, so that our new website is as helpful and attractive as possible. Any and all suggestions are welcome. If you have any comments to make regarding the website, please send them to marketing@foisolutions.com.au. We look forward to hearing you.

Case summaries

The annual FOI Solutions VCAT and Privacy Case Summaries for 2013 are now available for purchase at <http://www.foisolutions.com.au/publications.php>. If you have any questions about the summaries or would like to purchase copies from previous years, please contact us at marketing@foisolutions.com.au.



Website

Be sure to check our website at www.foisolutions.com.au for information on recent news or developments, our training sessions and legal services offered. Register early for any training or seminar sessions as they tend to fill quickly.

On our website you will also find hotlinks to cases in which we have acted as well as other helpful information.



Professional excellence in government law

Training

FOI Solutions conducts training sessions and lunch time seminars throughout the year including:

- Basic FOI training for FOI decision makers
- Intermediate FOI training for FOI decision makers
- Protected Disclosures
- Drafting Good FOI Decisions

PART II STATEMENTS

We will run a training session with practical tips on compiling and updating Part II statements to ensure that your agency is compliant with the appropriate statutory regulations.

FOI REFRESHER

This session is a first-time offering for practitioners who have previously completed our basic and/or intermediate training, or who have FOI experience and would simply like to refresh their understanding of FOI.

Upcoming Sessions

Basic & Intermediate FOI Training

Monday 5 May 2014
Monday 17 March 2014 (SOLD OUT)

Part II Statements (“You can’t handle the truth”)

Wednesday 26 February 2014

Agency Rights under the FOI Act

Wednesday 19 March 2014
Wednesday 26 March 2014
Wednesday 9 April 2014

FOI Refresher

Wednesday 2 April 2014

Reasons for Decisions in FOI

Wednesday 21 May 2014

Health Sector Forum

Monday 23 June 2014

New topics and sessions are added from time to time, so be sure to check our website regularly. If you would like to express interest in attending any future session, or have a particular topic you would like covered in a future training session or lunchtime update, please contact us at marketing@foisolutions.com.au.

Further information

If you would like any further information about the matters raised in this Newsletter or any assistance with FOI, privacy, protected disclosures or other administrative law matters generally, please do not hesitate to contact

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Feedback about the newsletter is also welcome.

Don't forget our **FOI and Privacy VCAT decision summaries** are available on a monthly subscription or an annual basis to keep you up to date with developments in this area.

If you are interested in purchasing a copy of the 2013 summaries (back issues are also available), log on to our web site at www.foisolutions.com.au and click on the “Publications” button for more information.