

From the Executive Director...

NO news from Parliament about the Bills amending the FOI Act and replacing the Information Privacy Act which I reported on in our last newsletter. At the time of publication, both Bills had been read a second time in the Legislative Assembly but not progressed further. For progress reports visit the home page on our web site.

Our "Privacy Detox" free lunchtime session on 21 July 2014 proved to be successful. Participants reported concerns about feeling under-supported by senior management and a general culture of reacting to possible privacy breaches rather than taking proactive steps. In the light of the Privacy Commissioner's emphasis on Privacy by Design, including the taking of proactive measures to avoid privacy breaches, agencies may need to seriously re-think their approaches.

MICK BATSKOS
Accredited Specialist in
Administrative Law



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Recent Cases

Anderson v University of Melbourne

In *Anderson v the University of Melbourne*, the applicant lodged two review applications regarding decisions by the University to grant access. The University applied to VCAT for both proceedings to be struck out on the basis that neither request was valid.

The Tribunal struck out both proceedings as misconceived under s 75 of the *VCAT Act*. The proceedings were found to be misconceived, as the request was not valid under s 17. This was because the applicant did not provide information concerning the documents as was reasonably necessary to enable the University to identify the documents sought.

The University attempted to clarify the applicant's request by providing the applicant information on the issues he could have used to clarify his request and by asking a set of questions regarding the applications, but in both instances the applicant failed to respond.

The Tribunal noted that the applicant could still make a valid request under s 17.

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Recent Cases continued...

Risson v Independent Broad-based Anti-corruption Commission

The applicant complained firstly to the Office of Police Integrity ("OPI") about alleged abuses by Victoria Police while investigating the applicant's allegations of harassment. Her former employer, the OPI, determined that this complaint did not warrant investigation. The applicant made an FOI request five years later for various documents, including documents relating to her complaint.

The OPI refused this request on the basis that they were documents to which s 51 of the *Police Integrity Act 2008* applied, and accordingly the FOI Act did not apply to them. The applicant applied for internal review of this decision, which affirmed the original decision, and then applied to VCAT for review. During this time, the OPI was replaced by the Independent Broad-based Anti-corruption Commission ("IBAC"), and the IBAC was substituted for the OPI as the respondent.

The Tribunal concluded that while it had jurisdiction to hear the application, the application should be struck out under s 75 of the VCAT Act. The Tribunal had jurisdic-

tion because the OPI was an "agency" under the FOI Act, and had refused to grant access to the documents in accordance with a request under the FOI Act. Even though the OPI had relied on s 51 of the *Police Integrity Act* as a basis for denying access to the documents, the refusal was still made under the FOI Act and the Tribunal could review the decision because it was made by an internal review officer of the OPI.

To this end, the Tribunal found that the documents did fall within the scope of s 51 of the *Police Integrity Act*, and accordingly were excluded from the operation of the FOI Act. As every document fell within this section, the Tribunal said this was the "clearest of cases" in which an application should be summarily dismissed.

The applicant had also applied for orders to remain anonymous, but the Tribunal rejected this application because the criteria in the *Open Courts Act 2013* were not met: the orders were not necessary to prevent a real and substantial risk of prejudice to the proper administration of justice or protect the safety of any person, nor were they in the interests of justice. Accordingly, the applicant could not remain anonymous.

Recent Updates

FOI Commissioner – decision on original request

Section 49P of the Victorian FOI Act provides that after conducting a review of a decision, the FOI Commissioner **must** make a fresh decision **on the original application**. This should be taken as a reference to the original request for access made by an applicant. That provision suggests that the FOI Commissioner probably does not have power to seek to have the applicant amend the request for access once a decision has been made by an agency and then make a decision on some "amended" request.

This view is supported by VCAT decisions that have found that the rights of an applicant and the obligations on a decision maker are crystallised or fixed as at the date a valid request is received.

Further, there is no express or implied power enabling the FOI Commissioner to seek to have the request for access amended by the applicant during a review process. The Commissioner's powers are arguably limited to reviewing the decision made on the request as it was. If the request is not valid, it cannot later be cured by subsequent events. Just as it could not be cured by the VCAT (which must consider the request as it was put to the original decision maker) it cannot be cured by steps

taken by the Commissioner. Both the FOI Commissioner and the VCAT do not have power to permit a request to be amended after the event.

IMPORTANT: Office of Australian Information Commissioner (OAIC) disbanded

As part of the most recent Federal budget, the Government announced that the OAIC will be disbanded from 31 December 2014. This means that any unresolved review applications before the OAIC will be transferred to the AAT and the Ombudsman.

FOI Solutions is perfectly placed to assist with AAT reviews given our extensive history and experience in dealing with FOI reviews before the AAT and on appeal to the Federal Court and Federal Circuit Court (formerly Federal Magistrates Court). If you are from a Commonwealth Government agency covered by the Commonwealth FOI Act, we can help you deal with those reviews at the AAT as well as assisting you with finalising them with the OAIC before then.

For more information about our involvement in Commonwealth AAT matters involving FOI, or how we can help your agency, please see our web site at: <http://www.foisolutions.com.au/Proceedings.php> or contact our Executive Director, Mick Batskos on (03) 9601 4144.

Question time

Q: Where a legal or insurance firm makes an FOI request for information about their client who is an individual, is there something our agency should do to ensure they have been properly authorised to make the request?

A: Where an FOI request is made by someone purporting to act as agent for an applicant *and* which seeks information *about* the applicant, you should contact the purported agent first and ask them to provide a signed consent from their client for them to receive personal information on their client's behalf. By doing this, you will avoid any potential privacy breaches from occurring in the event the purported agent was not authorised to make the request. If you would like advice or assistance with drafting an appropriate consent document to be forwarded to a purported agent please let us know.

Q: Does a 'no documents' decision need to contain reasons as to why there are no documents relevant to a request?

A: Yes. Under s 27 of the FOI Act, one of the decisions for which a statement of reasons *must* be given is a decision of an agency that 'no such documents exist'. A statement of reasons must state the findings on any material questions of fact, refer to the material on which those findings were based and explain the reasons for the decision. If an applicant does not properly understand the reasons why your agency holds no relevant documents, you run the risk of them making a complaint to the FOI Commissioner under s 61A of the FOI Act. If you can properly demonstrate to an applicant why no relevant documents exist and that your agency has undertaken thorough and diligent searches, that could be the end of the matter.

Firm News

Mick Batskos speaking at National Conference

The Executive Director of FOI Solutions, Mick Batskos, recently gave a presentation at the 2014 Australian Institute of Administrative Law National Administrative Law Conference: Innovations in Administrative Law and Decision-Making.

Held at the University Club of Western Australia in Perth, WA, the conference brought together leading academics, lawyers, judges and government officials to present on the current innovations in administrative law and decision making, as well as the current state of administrative law in the Commonwealth, States and Territories of Australia.

Mick presented a paper entitled "Balancing the treatment of "personal information" under FOI and privacy laws: a comparative Australian analysis". The paper looked at what privacy regime, if any, exists in each Australian jurisdiction as well as what information is protected and how. It also looked at how personal privacy is protected under freedom of information legislation in each Australian jurisdiction, and how the FOI and privacy regimes inter-relate. The paper was very well received.

FOI Solutions invited to Regional Library Corporations' Quarterly Meeting

FOI Solutions has been invited to provide a general update on the changes to FOI and privacy legislation in Victoria to the quarterly meeting of Regional Library Corporations' Chief Executive Officers on 8 August 2014. We are grateful for the opportunity to present at this meeting and look forward to meeting some new faces.

Amy Hu returns from maternity leave

Amy Hu, Senior Solicitor, has returned from maternity leave. All the staff at FOI Solutions are excited about her return to the office. Initially Amy will be working on Mondays and Tuesdays.

Farewell to Emma Burn

Sadly, Emma Burn, our longest serving Law Clerk will be leaving FOI Solutions in late August to concentrate on her final semester at University. Emma's friendly disposition and extensive knowledge will be sorely missed. FOI Solutions wishes Emma all the best for the future.

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 changes or improvements we can make to our current website. We want to make it relevant to your needs.

Any 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 from you.

As a reminder, on our current website you can also find hotlinks to cases in which we have acted as well as other helpful information.



Professional excellence in government law

Training

FOI Intensive update

Have you ever missed our training sessions due to travelling distance, limited time or clashing commitments? Does your location discourage travelling for a one hour lunchtime session?

This is your chance to catch up on our most popular sessions – all in one day! The schedule includes Social Media and FOI, Avoiding Unnecessary Processing, Recent Developments, Electronic Documents, Agency Rights and Part II Statements.

Do not miss out on this intensive session being offered on **Monday, 18 August 2014** and **Friday, 29 August 2014**.

Common Privacy Problems for Agencies

We will be running a training session exploring some of the most common privacy problems encountered by privacy officers of government agencies, as well as ways to handle these problems. This session is also aimed at improving agency awareness of such problems.

Do not miss out on this session being offered on **Wednesday, 8 October 2014**.

Upcoming Sessions

FOI Intensive

Monday 18 August and Friday 29 August 2014

Common Privacy Problems for Agencies

Wednesday 8 October 2014

Drafting Good FOI Decisions

Monday 20 October and Monday 10 November 2014

Council-specific FOI and other issues

Monday 20 October and Monday 10 November 2014

Lessons from the FOI Commissioner

Monday 1 December 2014

If you would like to express interest in attending any future session, order training papers, to register, 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 government law matters, please do not hesitate to contact

Mick Batskos

Tel: 9601 4111

Mobile: 0417 100 796

Fax: 9601 4101

Email: mick@foisolutions.com.au

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.