

From the Executive Director...

Significant changes have been made to Victorian privacy law. On 17 September 2014, the *Privacy and Data Protection Act 2014* commenced operation. It repealed the *Information Privacy Act 2000* and established a Commissioner for Privacy and Data Protection. The inaugural Commissioner also announced earlier this year that “Privacy by Design” was formally adopted in Victoria from 1 July 2014. These changes introduce significant benefits for and responsibilities on agencies. FOI Solutions has developed a training session highlighting how those benefits and responsibilities affect agencies, as well as a practical toolkit for internal assessment and implementation. Following popular demand, we are available to conduct training sessions specifically tailored to organisations—from sessions targeted at senior management and the executive team, to those raising broader organisational awareness. We are also available to assist with conducting audits to ensure your documents and publications are updated to make use of and comply with the new legislation, and incorporate Privacy by Design.

MICK BATSKOS

Accredited Specialist in Administrative Law



Contents

Recent Cases	1-2
Recent Updates	2
Question Time	3
Firm News	3
Website	4
Training	4
Further Information	4

Recent Cases

Brygel v Victoria Police [2014] VCAT 1199

In this case, the applicant applied for a number of documents related to an incident in which he was forcibly ejected from the Victorian Taxi Directorate’s office by security guards at the premises. The documents were in relation to Victoria Police’s investigation of the matter. Victoria Police found the ejection to be reasonable.

The main issues concerned sections 33 and 25: whether the documents should be exempt because they contained information relating to the personal affairs of people which would be unreasonable to disclose, and whether CCTV footage sought could be edited to remove exempt components.

The Tribunal found that names, addresses and images of various people contained within the documents constituted information relating to the personal affairs of people, and that disclosure would be unreasonable for a number of reasons. The applicant was found to have been aggressive and intimidating towards many of the people whose information he sought, and the Tribunal concluded that the applicant may further harass these

Cont. p2

Recent Cases continued...

people if their personal information was disclosed to him. The Tribunal also noted that the applicant could possibly spread the information more broadly. On the whole, disclosure of the information relating to the personal affairs of various people connected to the incident to the applicant was found to be unreasonable, due to the need to protect the privacy of these people and to prevent potential future harassment by the applicant.

The Tribunal also found that pixilation of the CCTV footage sought, so as to remove the exempt components, would result in meaningless footage granted to the applicant. Moreover, the Tribunal noted Victoria Police's submission that this process would have to be performed by an audio-visual technician in the Police's Forensic Services Department, and that this Department's resources were required to be directed towards urgent forensic work relating to investigations of serious crime.

Spragg v Chief Executive Officer of Customs [2014] AATA 667

In this case, the applicant sought access to a document alleged to have been sent by him to Australian Customs and Border Protection. The document was faked and an investigation did not uncover who the author was.

Access to information about two persons apart from the applicant was refused on the personal information exemption and that disclosure was contrary to the public interest. The Information Commissioner had also agreed with this decision.

The applicant sought review of the decision from the Administrative Appeals Tribunal.

Is the relevant document conditionally exempt under s 47F of the FOI Act?

The Tribunal found that the disclosure of the document "would involve the unreasonable disclosure of personal information" about persons, and was therefore conditionally exempt. Under s 47(2) the disclosure was found to be unreasonable as the personal information of the individuals is not "well known", it is not available from "publicly accessible sources", and that the information that relates to the individuals is not "known to be (or to have been) associated with the matters dealt with in the document". The Tribunal additionally had regard to matters including the unsubstantiated adverse assertions about the two persons, the likelihood that those persons would not wish for those assertions to be disclosed, and that the document is unsigned and the authorship is unknown.

Would access to the relevant document, on balance, be contrary to the public interest, for the purposes of s 11A (5) of the FOI Act?

On balance, disclosure of the parts of the document was found to be contrary to the public interest. Relevant factors favouring access to the document included promoting the objects of the FOI Act, allowing or assisting "inquiry into possible deficiencies in the conduct or administration of an agency or official", and to, under FOI Act Guidelines, "advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies". However, these factors did not outweigh the factors against granting access to the relevant document. Factors weighing against access to the document were that the document comprised unsubstantiated adverse assertions, the authorship of the document was uncertain, and granting access to the document could reasonably be expected to prejudice the protection of the right to privacy of the individuals referred to in that document. Access was refused.

Recent Updates

Documents disclosing a consultant's business methodology can be exempt

The Victorian Civil and Administrative Tribunal ("VCAT") has confirmed that documents which individually or collectively describe the methodological approach taken by consultants to government agencies can be exempt from disclosure under the *Freedom of Information Act 1982* ("Act").

In *Green v Department of Human Services* the Tribunal found that information in documents provided by a consulting firm which would disclose information as to the methodology by which the consulting firm assisted the client Department was information of a business, commercial or financial nature about the consultant. The consulting firm was a business commercial or financial undertaking.

The Tribunal also accepted the evidence of the consulting firm that disclosure of this valuable commercial information would expose it unreasonably to disadvantage under s 34(1)(b) of the Act. The Tribunal accepted that:

- disclosure would enable competitors to take information and knowledge developed by the consultant and have a ready-made starting point;
- this would diminish the competitive advantage of the consultant, erode its position and result in fewer engagements, causing commercial disadvantage;
- the information could not be disclosed without causing substantial harm.

Updated Cth. FOI Guidelines published

The Office of the Australian Information Commissioner has published a revised version of its FOI guidelines. These are available at <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/>.

IBAC and FOI Commissioner publish Annual Reports

The Independent Broad-Based Anti-Corruption Commission ("IBAC") has tabled its Annual Report for 2013-2014 in Parliament. The report is available at <http://www.ibac.vic.gov.au/docs/default-source/ibac-annual-reports/ibac-annual-report-2012-13.pdf?sfvrsn=8>.

The Victorian FOI Commissioner has also published her Annual Report for 2013-2014. The report is available at <http://www.foicommissioner.vic.gov.au/resources/5080ccd9-af79-47cc-a251-6645d3a7013c/>

[annual_report_2013-14_%28full%29.pdf](#).

These reports provide an overview of the functions, achievements and structure of the offices of the IBAC and the FOI Commissioner.

Please contact us if you have any questions about how any of the information in the reports applies to your council, agency or department.

The FOI Commissioner has warned agencies that they need to adequately explain their decisions to applicants. See the "Training" tab on our website for a workshop to help you write better decisions.

Question time

Q: Where an agency refuses access to certain documents and determines that other documents falling within a request do not exist, should the agency give the applicant FOI Commissioner review rights and inform them of their right to complain to the FOI Commissioner?

No. In our view, you cannot 'split' an FOI request into separate parts. For that reason, an agency cannot make a decision both to refuse access to documents and a decision that no documents exist.

A 'no documents' decision should only be made where there are no documents **at all** falling within the whole request. If there are **some** documents falling within a request, your agency's decision should address **those** documents rather than also purport to make a 'no documents' decision. In our view, your agency either has documents falling within a request or it does not.

Q: What do I do if Victoria Police asks for information my organisation holds that is personal?

Providing personal information to investigative bodies such as Victoria Police is permitted in certain circumstances. To meet the exception in IPP 2.1 your organisation will either need to have reason to suspect that unlawful activity is being engaged in (or has been or may be engaged in) and disclosure is a necessary part of your organisation's investigation of the matter or in reporting those concerns to a relevant authority, such as Victoria Police. The disclosure could be required or authorised by law. The disclosure could also occur if your organisation reasonably believes that it is reasonably necessary to disclose the personal information for a law enforcement agency, such as Victoria Police, to do its job, such as investigate, prosecute or prevent offences. The offences could be criminal offences or those where a penalty or sanction is imposed by law. You should take steps, such as obtaining in writing and on letterhead from Victoria Police, enough information for your organisation to form the necessary belief.

Firm News

Presentation of papers

Executive Director, Mick Batskos, has recently presented the following papers:

- *FOI and Record Keeping* for the Emergency Services Sector Records and Information Management Group of RIMPA, 5 September 2014.
- *Current Issues in Victorian FOI Law* for the Monash University postgraduate unit, Principles of privacy and freedom of information, 4 September 2014.
- *FOI Commissioner review process – at the coal face* for the Municipal Association of Victoria, 17 September 2014.

In addition, Associate, Elisa Hesling presented a paper entitled *Records, Social Media & the Right to Access*:

The Social Media Conundrum for the Records and Information Management Professionals of Australasia annual national conference in Adelaide on 8 September 2014.

Welcome to Sophia Georgeff

Sophia commenced employment with FOI Solutions as a law clerk in August 2014. She is currently studying the Juris Doctor postgraduate law degree at the University of Melbourne. She is excited to be a part of the team. She is a welcome addition to FOI Solutions.

Farewell to Mel Togiasso

Sadly, Mel Togiasso, our Senior Administration Officer, has left the firm. Mel was with the firm for four years and provided valuable administrative support to the rest of the staff. Her warm character, sense of humour and cheerful personality will be sorely missed. FOI Solutions wishes Mel all the best with her future endeavours.

Website

In coming months, 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.

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.

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.



Professional excellence in government law

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.

Training

Drafting Good FOI Decisions

This interactive session ensures that that you get all the information and instruction needed to comply with your obligations.

It includes comprehensive workshops for specific types of decisions with practical examples for different types of decisions.

This session is intended for all levels of staff handling FOI requests, managers of FOI decision making functions and staff liaising with the FOI Commissioner.

Do not miss out on this session being offered on **Monday, 10 November 2014**.

Council-specific FOI Issues

Are you employed by a council? Do you find it frustrating to work with FOI requests? Does the interplay between various pieces of planning, building, privacy and FOI legislation confuse you?

In this session, we will be exploring some of the common issues faced by councils when receiving and processing requests for documents, whether via the FOI Act or otherwise. This is your chance to develop a clear understanding of how the public can seek information and documents from your council, and how you can practically respond to these requests.

Do not miss out on this session being offered on **Monday, 10 November 2014**.

Upcoming Sessions

Drafting Good FOI Decisions

Monday, 10 November 2014 (morning)

Council-specific FOI Issues

Monday, 10 November 2014 (afternoon)

FOI Basic and Intermediate

Monday, 24 November 2014

Lessons from the FOI Commissioner

Monday, 1 December 2014

For further information please contact us at marketing@foisolutions.com.au.