FOI SOLUTIONS

CLIENT NEWSLETTER

Volume 4, Issue 1 Apr / May 2003

RECENT CASES (VIC)

Dob in letters to bodies performing regulatory functions?

In the VCAT case of *Re White and Pyrenees Shire Council* (8 November 2001) the Tribunal considered how letters of complaint to a local council should be treated.

An individual sent a letter of complaint to the Council complaining about the state of the applicant's property and suggesting that the property "should be cleaned up" because of increased tourism in the area. The letter also requested that the Council inspect the property to confirm the complainant's concerns. The Council wrote to the applicant informing him of the complaint and seeking comments and proposed action in relation to the complaint.

In response the applicant sought access under the FOI Act to the whole of the file containing the reference on the letter from the Council about the complaint including the notice of complaint itself. The Council claimed exemption under sections 31(1)(c), 33(1) and 35(1)(b) of the FOI Act.

At the Tribunal the applicant argued that he was entitled to receive details of the identity of the complainant and sought to draw parallels between that complaint and objections in a planning permit process. The Tribunal correctly distinguished the 2 processes confirming that when an objection is made on a planning permit the objector knows that the objection is not confidential and that his name as well as his objection are matters of public record and would be communicated to the applicant for the permit.

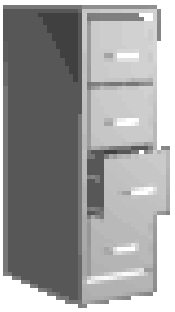
The Tribunal found:
"*The complaint here is in an entirely different category. The Shire has statutory responsibilities, including law enforcement responsibilities in areas such as building regulation, dogs and cats, health, by-laws, etc. The Shire is empowered to take action in regard to unsightly properties.*

Like most agencies of government with law enforcement functions the Shire depends heavily on information received from ratepayers and residences. Law enforcement agencies receive, daily, thousands of pieces of information from the public. This flow of information is vital if those agencies are to discharge their public responsibilities."

In this particular case the complainant made it clear that he or she did not wish to have their name disclosed as the complaint was made in confidence. Unless complainants can be assured of confidentiality, the likelihood is that much of the information provided to law enforcement authorities of this State, including Shire Councils, will dry up. This would be inimical to the public interest.

The Tribunal described the applicant as "an enthusiastic litigant". It found that he was aggrieved about the complaint and had shown himself to be a person "who will pursue his grievances up to the hilt". In the circumstances the Tribunal is concerned that if he became aware of the name of the author of the letter he may pursue that individual one way or another.

Contents



Solicitors & Consultants
Level 5
105 Queen Street
Melbourne Victoria 3000

DX 345
Melbourne VIC
Email mick@foisolutions.com.au
www.foisolutions.com.au

Telephone (03) 9601 4111
Facsimile (03) 9601 4101
(03) 9601 4121
Mobile 0417 100 796

The Tribunal found that disclosure of the complainant's name would be unreasonable because there is an unacceptable risk that the applicant will inappropriately pursue the complainant and occasion the complainant needless distress. There was no demonstrable need or purpose for the applicant to know the complainant's name and the complainant has expressed a desire to remain confidential. Accordingly the exemption under section 33(1) of the FOI Act was made out in relation to

the name address and handwriting contained in the letter of complaint.

The Tribunal was further satisfied that the exemption in section 35(1)(b) was made out. That is, the information was communicated in confidence and the disclosure of the complainant's name would be reasonably likely to impair the ability of the Council to obtain similar information in the future.

Numerous requests treated as one voluminous one

The Court of Appeal had reason to consider the operation of section 25A(1) of the FOI Act in the case of *The Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246. This case considered the application of section 25A(1) of the FOI Act and, in particular, whether more than one request for access can be treated as a single request for the purposes of the application of that sub-section. The case involved 321 requests for access to documents relating to the circumstances surrounding the explosion and fire in 1998 at the Esso/BHP plant at Longford in Gippsland. The requests were made by a Solicitor acting on behalf of Esso in the period 10 to 24 December 1999. The requests were made to the Department of Treasury and Finance ("**DTF**") or were made to other Departments and subsequently transferred to DTF.

Before the VCAT it was the evidence of DTF, considering the 321 requests as a single request or a single group, that processing the requests would substantially and unreasonably divert the resources of DTF from its other operations under section 25A(1). The FOI Officer had undertaken a sampling process with the assistance of a former employee who had managed the records system of the Energy Projects Division of DTF. After examining the requests, it was estimated that there were approximately 12,500 to 13,000 files and 7,000 document records which came from the Energy Projects Division of DTF. About 2,600 of those files related to the reform of the Gas Industry and would probably all contain documents falling within the terms of the request. Accordingly a sample of 21 files from the 2,600 were taken and 10 of those reviewed.

On the basis of the time taken to conduct the review of the 10 files it was estimated that it would take 1 FOI Officer working full time approximately 14 years to review the 2,600 files.

The VCAT concluded that the DTF erred when it processed the requests as one request. It was of the view that the word "request" in section 25A(1) meant an individual request and did not permit DTF to combine all the requests for the purposes of determining whether that section applied. The Tribunal went on to find that if it was incorrect, DTF had failed to establish that any of the 321 requests was of the kind that fell within section 25A(1). It was not persuaded by the evidence that the processing of the requests even if grouped as a single request would more probably than not substantially and unreasonably divert the resources of DTF. It was particularly critical of the sampling process undertaken and the reliance upon the opinion of a former officer of DTF.

The Court of Appeal held that on its proper construction, section 25A (1) of the FOI Act was capable of applying to multiple related requests for access to documents (made at or about the same time by the same person) taken as a whole. It found that there was relevant "commonality" between the requests to entitle the DTF to aggregate them for the purposes of determining whether section 25A (1) applied. The requests were all closely related to one another in the sense that they were all:

?? Made by the one person (on behalf of Esso);
?? Seeking documents that were concerned with the same general subject matter;
?? Filed with the Department at or about the same time;
?? Made as a result of the inability of Esso to obtain documents sought pursuant to the ordinary discovery process in Federal Court proceedings.

It should be noted that those factors should not be taken as a conclusive list of factors. They were only some factors relevant to this particular case. It is uncertain what other criteria will be used to determine the commonality necessary to permit more than one request to be treated as a single request for the purposes of section 25A(1). FOI Officers should be careful to ensure that there is a sufficient degree of commonality. It is interesting to note the comments of one of the judges who expressed no opinion about the criteria but found that "*whatever they are, they must be satisfied in this case*."

One of the judges gave particular emphasis to the fact that to treat the number of requests other than as a single request would enable an applicant to evade the operation of section 25A and that as a matter of statutory interpretation such evasion should not be permitted. He emphasised that it was important to give priority to substance over form.

Another important aspect of this case is a comment made by Justice Ormiston in relation to what makes up a valid request for access to documents under section 17 of the FOI Act. After referring to an example of the type of request made in that case, Justice Ormiston stated the following at paragraph 6 of his decision:

"One can imagine more broadly stated requests, but they would almost invariably fall foul of s.17, especially sub-s.(2), which requires sufficient information "to identify the documents". ***Requests must be for specific documents or groups of documents, not for every document in a broad category****."* (Emphasis added)

No need for documents to be released under FOI before they can be amended

In the recent case of *Re Al-Hakim and Monash University* (12 July 2002) Mick Batskos of FOI Solutions appeared for the University. That case considered a number of important jurisdictional matters relating to requests to amend documents containing information relating to the personal affairs of an individual.

In that case the applicant had made a number of requests for amendment of documents containing such information about his personal affairs. Under section 39 of the FOI Act a request for amendment of such a record may be made where a document containing that information "is released to the person who is the subject of that information". The Tribunal considered what was meant by the word "released" in that passage.

It was submitted by the University based on the original wording of the equivalent provision in the Commonwealth FOI Act, the second reading speech of Mr John Cain who introduced the FOI Act in Victoria, and on a decision in *Re Setterfield and Chisholm Institute of Technology (No.2)* (1986) 1 VAR 202, 208 that the word "released" meant released to the applicant making the request by the agency under the Freedom of Information Act. It was submitted that it did not extend to documents which the applicant had obtained from the agency from other means (for example during ordinary correspondence or in legal proceedings between the parties). It also did not extend to the documents obtained by a requestor from a different agency under the FOI Act.

The Tribunal found that the word "release" did not have such a restriction placed on it. Conformably with the approach to interpretation in various Supreme Court cases suggesting that the FOI Act should be read liberally, the Tribunal found that the word "released" could include documents that were provided to the applicant in other legal proceedings and not under the FOI Act. The fact that they were received in those circumstances did not preclude an application for amendment being made under section 39 of the FOI Act. The Tribunal left open as an interesting question whether an amendment could be sought in relation to a document released by another agency under the FOI Act.

Another important aspect of this case was consideration of section 40 of the FOI Act that sets out the requirements that must be satisfied in order for there to exist a valid request for amendment.

In respect of the number of documents the University argued that the applicant had not specified the amendment that he wished to be made and that accordingly, the application for review should be summarily dismissed under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998. For that to be successful this meant that the applicant for review had to

be obviously hopeless and bound to fail. The Tribunal indicated that that would be the case where, for example, the respondent agency has an unanswerable defence.

The Tribunal found in all the circumstances that the requests for amendment failed to specify the amendments the claimant wished to be made and was therefore defective. The requirement to specify the amendments sought is an essential requirement and no request that fails to include it can succeed before the Tribunal as it would be utterly hopeless. Therefore the respondent had an unanswerable defence and section 75 of the VCAT Act was made out. In the matters that were before the Tribunal the applicant had failed to specify the amendments sought in respect of all but 2 documents and in those circumstances the Tribunal had no difficulty in dismissing the applications for review to that extent under section 75 of the VCAT Act.

This approach was also followed more recently in the case of *Re Al Hakim and Monash University* (Unreported, VCAT, 12 February 2003, Judge Bowman) where the VCAT found in relation to one document in a proceeding that there had simply been a failure by the applicant to comply with the provisions of the Act in relation to specifying the respects in which the relevant information is incomplete, incorrect, out of date or misleading and the end result is that the application was either a nullity or the respondent had an unanswerable defence. Leave to appeal was refused to the applicant by the Court of Appeal on 28 March 2003.

Injunction stops FOI requests

In the Federal Court case of *Steiner v LaTrobe University* (10 May 2002) Justice Ryan made an order that until the hearing and determination of the Federal Court case or further order, the applicant was restrained from making any applications under the FOI Act or taking any step in connection with any requests that may at that time have been pending. He relied on a previous decision by Justice Merkel in the Federal Court case of *Johnson Tiles Pty Ltd v Esso Australia* (2000) 174 ALR 701 713 where Justice Merkel referred to the fact that if requests for access are made and pursued by one party to a preceding under the FOI Act which required the Government agency to simultaneously comply with its obligations to made discovery under a Discovery Order in the court proceeding and to seek out and provide to the applicant the documents requested under the FOI Act, that it may be appropriate for the court to intervene. That intervention would be necessary in order to protect the integrity of the court process and it would be appropriate to make orders to ensure that any requirements imposed on the Government agency to comply with the FOI Act were deferred so that it would not undermine the integrity of the court processes.

Internal working documents and editing under s.25

In the VCAT case of *Re Darwish and Deakin University* (22 February 2002) the applicant was a disgruntled PhD student at the University who submitted his thesis in June 1998. The thesis was sent to 3 examiners 2 of whom recommended that additional work be undertaken and the thesis or other material be resubmitted. The third examiner recommended the awarding of the degree. Each examiner was asked prior to accepting the assignment whether he or she consented to their name being made known to the candidate. One examiner answered "No" by ticking a box in the document entitled "Examiner's Recommendation Form". That was the document in dispute.

The University argued that disclosure of the document would unreasonably disclose the personal affairs of the examiner. The Tribunal placed great weight on the natural interest of the applicant to know his examiners. It also relied on the fact that the examiner in question had indicated on the relevant document that he or she had asked the applicant's supervisor "for general guidelines". Finally the applicant alleged that his thesis was plagiarised. The Tribunal stated that the system for examination of PhD theses must be transparently fair and that although there is now greater emphasis on the protection of personal privacy in the community, there was also a greater emphasis on accountability and the latter took precedence in the present situation.

Importantly, there was nothing in the reasons for decision of the Tribunal to suggest that the procedures required by section 53A of the FOI Act had been complied with and the relevant examiner informed of his or her rights to intervene in the proceeding.

The University also relied on section 35(1)(b) of the FOI Act

to argue that the if the examiner's name was disclosed, particularly after expressly requesting that the name not be disclosed, it would be impaired in securing examiners in this particular discipline in the future.

The Tribunal relied on the evidence that only 3 to 5 percent of examiners elect not to have their names disclosed at Deakin University each year. In those circumstances the Tribunal did not find that there would be more than a trifling or minimal impairment by the disclosure of the name of the examiner in this particular instance.

Commercial in confidence

The VCAT decision in *Re Asher and Victorian WorkCover Authority* (13 May 2002) highlights the difficulties which agencies are likely to encounter in trying to justify the commercial in confidence exemptions in sections 34(1) and (4) of the FOI Act.

In that case the applicant was an opposition Member of Parliament who sought access to documents relating to a contract for the supply of advertising which was allocated after a tender process.

Section 34(1)(b) was claimed in relation to one document. However it was made clear that the information in question did not form part of the tender documentation but was merely a figure and narrative of work to be done that was a product of post-tender negotiations. Accordingly the Tribunal concluded that there was no information "acquired" by an agency from a business, commercial or financial undertaking. Even if that reasoning was incorrect, the Tribunal went on to consider whether or not disclosure would be likely to expose the business undertaking unreasonably to disadvantage.

One document contained some dollar amounts and some narrative accompanying those figures. Although not precisely clear what the dollar amounts were, it was clear that the contract did not state anywhere the total sum potentially payable under the contract. The narrative was merely details of the services to be provided "in a fairly trite and innocuous fashion". The Tribunal stated that the fact that the information is not generally available to competitors is one factor that by itself does not militate against disclosure. It concluded that greater weight was to be placed on the need for transparency and accountability than on "the tenuous evidence that the company will be disadvantaged vis a vis its competitors". Accordingly the exemption in section 34(1)(b) was not made out.

In relation to dealings by private sector companies with government the Tribunal accepted the submission that "the bar is lifted in these circumstances; practices that are completely acceptable, and indeed expected between private sector organisations take on a different hue when the contract is between public and private entities and public money is involved."

In relation to certain minutes of meetings and board papers containing details of the financial arrangement between the respondent and the contractor exemption had been claimed as deliberative document under section 30(1) of the FOI Act. The Tribunal found it difficult to conclude that the minutes formed part of the "creative processes" of the respondent but merely recorded matters of fact. A board paper comprising an executive summary and draft resolution and attached a 2-page issues paper seeking the board's approval of the contract was involved. The Tribunal could not accept that disclosure of that document could possibly be contrary to the public interest when the bulk of the information contained in it had already been disclosed to the applicant in other documents.

The Tribunal did find that disclosure of a 3-page tender evaluation assessment form where each tenderer was evaluated by 5 separate officers was an internal working document the disclosure of which would be contrary to the public interest. The Tribunal stated that it is a concomitant of the tender process that tenderers are entitled to some degree of anonymity and that disclosure of individual scores is likely to be harmful to the participants. This is particularly so when an external independent probity auditor has been hired to ensure the process is above board and entirely proper. However, the Tribunal did not accept the evidence that the identification of the unsuccessful tenderers would be harmful to them. The Tribunal stated:

"The business of unsuccessful tendering is simply part and parcel of business life and in no way marks out for attention the unsuccessful candidates. I might have felt differently had one of those unsuccessful tenderers given evidence to the Tribunal but this did not occur."

One part of a tender proposal put forward by the contractor was a costing of a particular campaign strategy which was not indicative of the total amount to be paid by the authority but

that "perhaps the position might have been different if, for instance, the Tribunal had received evidence that the firm had under quoted in an attempt to secure future work but this was not the case."

From a procedural position the case also provides further evidence that where a document contains information that is irrelevant to a request for access, it is appropriate that the relevant material be excised. This was evidenced in a minute of a board of management meeting where one paragraph and two lines were excised as they were "not germane to the matter before the Tribunal".

Disclosure to be considered to world at large

Re Bowes and Victoria Police [2002] VCAT 739

In this case Deputy President Galvin confirmed that when the Tribunal considers whether disclosure of personal affairs information would be unreasonable in all of the circumstances, it is necessary to consider reasonableness as it disclosure were to the world at large and not merely disclosure to a particular applicant. In that case interview tapes and photographs relating to an investigation of an incident by which the applicant was assaulted by another person were held to be exempt under section 33 of the FOI Act.

This approach was reiterated in the decision *Re Knight and CORE – The Public Correctional Enterprise* (Unreported, VCAT, 20 December 2002, Steele SM) at para 10 where the Tribunal stated:

"Once a document has been found <u>not</u> to be exempt from release to one applicant it is hard to imagine how it could be exempt from release to another, so reasonableness must be considered as if release of the document were to the world at large, not to this particular Applicant however much of it he already knows."

VCAT can refuse to review same documents or information

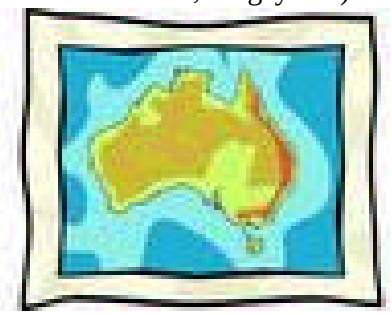
Re Downing and Victorian WorkCover Authority (Unreported, VCAT, 19 September 2002, per Megay SM)

In this case, the VCAT applied section 50(6) of the FOI Act and refused to review a decision of the Authority in relation to 4 documents that had been the subject of a decision by the VCAT in 1999. That is, the VCAT was satisfied that it had previously reviewed a decision of the Authority to refuse access to the same documents.

The Tribunal went on to reiterate that where documents where exempt under section 32 of the FOI Act on the basis of legal professional privilege, it required public interest points of a high order as to countervail the doctrine of legal professional privilege.

Editing exempt material under section 25

In some recent cases, the Tribunal has indicated a practical and common sense approach to interpreting when editing a document to remove any exempt matter is "practicable". In *Re Stewart and Department of Tourism, Sport and the Commonwealth Games & Anor* [2003] VCAT 45 Judge Bowman suggested that editing would be not be practicable where "to do so would reduce the document to something which was either meaningless, misleading or unintelligible." A similar sentiment was expressed by the VCAT in *Re O'Sullivan and Department of Employment, Education and Training* (Unreported, VCAT, 1 November 2002, Megay SM)



RECENT CASES (COMMONWEALTH)

All reasonable steps to find documents

In *Re Langer and Telstra Corporation Limited* [2002] AATA 341 and *Re Meschino and Centrelink* [2002] AATA 611 the AAT reiterated that s.24A needs consideration, first, of the need to take all reasonable steps to find the documents sought and, secondly, whether the documents cannot be found or do not exist. In determining whether all reasonable steps have been taken the following points are important:

?? Such steps must be taken to discover the documents as are appropriate in the circumstances;
?? The circumstances relevant to determining the appropriate steps include:
?? Subject matter of the documents sought;
?? File management systems;
?? Destruction schedules followed in the agency;

?? Steps already taken to locate documents within the terms of the request.

FOI v Discovery – use of documents

In *Re Ngyuen and Child Support Registrar* [2002] AATA 177 the Tribunal reiterated some of the important differences between access under FOI and discovery in the following terms:

"*To my mind the relevant distinction in this matter is that if documents are obtained in court proceedings by way of discovery, then those documents can only be used in the said proceedings and any attempt to use them outside of those proceedings may be restrained by injunction.*

*Whereas release under the Freedom of Information Act is release against the whole world with no restrictions. It is perhaps unfortunate that the Freedom of Information Act does not permit a release to certain parties with restri*ctions."

Taking this matter a little further, because of the difference in effect of release, if documents have been released to a party to a court proceeding, that is irrelevant to whether the documents are exempt from disclosure under the FOI Act. The test under FOI is release to the public at large and must be contrasted to release to a party in litigation where the court can exercise control on the use made of the documents: *Re Dutton and Attorney-General's Department* [2002] AATA 293.

When is a request valid?

In *Re Hart and Commissioner of Taxation* [2002] AATA 786 the AAT considered whether a letter from the applicant, in relation to a broadly worded request for which a deemed refusal had arisen, enlarged the request or merely particularised the existing request. The AAT found that it did not enlarge the scope of the request but merely particularised it. The following important reminder was stated by the AAT at para 6 of the decision:

"*Section 15 provides individuals with the right to request access to documents held by a Minister or agency. The terms of the request must satisfy the criteria set out in s15(2). It is often the case that requests for access will be made in very general terms as the applicant may not have a clear idea of what documents exist. The department or agency must engage in a process of consultation with the applicant to see if it is possible to refine so that particular documents can be identified and a decision made about their release. The request is deemed to have been made when s15(2) has been satisfied. Before that point, the request is not a valid FOI request.*"

When is a "clarification" a new request?

In *Re Sobczuk and Secretary, Department of Family and Community Services & Anor* [2002] AATA 338 the Tribunal considered several related proceedings at one time. The Tribunal made an important observation that FOI Officers need to keep in mind when dealing with purported clarifications of requests. Where a request purports to clarify an earlier request for access, but in fact particularises and broadens that earlier request, it should properly be treated as a new request for access. The corollary of this is that if the request merely particularises the earlier request without broadening it, it should be treated as part of the initial request.

Some procedural tips and reminders

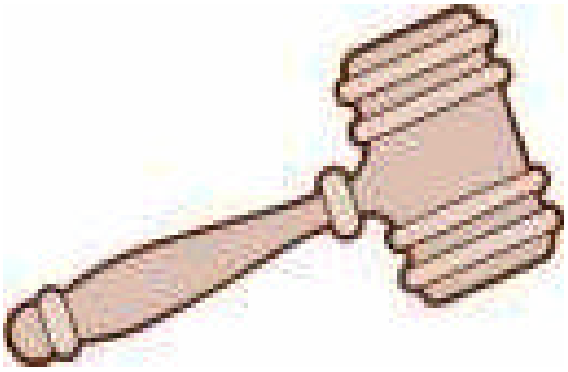
In the case of *Re Srooo and Department of Defence* [2002] AATA 115, the Tribunal provided a number of procedural tips or reminders that should be borne in mind by FOI Officers.

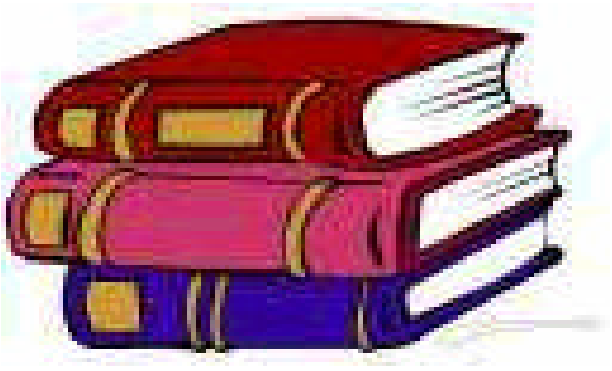
In relation to the Attorney-General's Department's FOI Memoranda, the Tribunal stated that the memoranda reflect government policy as to the interpretation of certain provisions. It hasted to add that:

"*...it is not bound by the FOI memoranda, however Commonwealth agencies operating under the Act, who are also not stricly bound by the memoranda, should pay due deference to the memoranda as expressions of a mixture of government policy, a distillation of principles derived from the experience of the Attorney-General's Department and other agencies in operating under the Act, including explaining their actions to tribunals, and as documents designed to foster consistency of decision-making under the Act. The tribunal regards the memoranda as useful resource documents for it in its deliberations*."

In relation to time limits under the Act the Tribunal made the following comment:

"*The tribunal recognises that the time limits in the Act are relatively short for certain types of request. It is perhaps unfortunate that there is no statutory mechanism for the grant of a longer period in an appropriate case. However, at present there is no such facility and an agency should do all it can to comply with a request within time. Failing that, at the very least, it could liaise with a requester to try and seek agreement to a refinement of the request or an amendment to the request*."





LEGISLATIVE DEVELOPMENTS

New exemption for Victoria

On 16 April 2003 new amendments to the *Freedom of Information Act* 1982 ("**FOI Act**") were introduced by Part 8 of the *Terrorism (Community Protection) Act* 2003 ("**Terrorism Act**").

The amendments introduce a further exemption into the FOI Act. Section 29A of the FOI Act has been inserted and has taken effect from 16 April 2003 (the day after Royal Assent was provided). It provides that a document is exempt if its disclosure would or could reasonably be expected to cause damage to:
(a) the security of the Commonwealth or any State or Territory; or
(b) the defence of the Commonwealth; or
(c) the international relations of the Commonwealth.

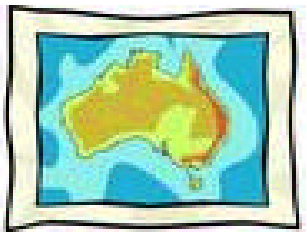
The Terrorism Act also introduced other procedural provisions and consequential amendments to support the introduction of the new exemption. These include a procedure for certification of a document in a request ***if it existed*** as exempt under section 29A of the new exemption. It also sets out what procedure is open to the Victorian Civil and Administrative Tribunal where this exemption is claimed.

Should you require any further information about the new exemption, please do not hesitate to contact Mick Batskos:
(03) 9667 0233
(fax: (03) 9667 0237) or
email: mbatskos@freegate.net.au

Northern Territory

It is also interesting to note that the Northern Territory has introduced an Information Act 2002 which will take effect from 1 July 2003. It is a unique piece of legislation in Australia as it incorporates provision about freedom of information, privacy and archives all in one Act.

It is now fair to say that all Australian States and Territories have



Further Information

If you would like any further information about the matters raised in this Newsletter or any assistance with FOI matters generally, please do not hesitate to contact Mick Batskos on tel: 9601 4111 or mobile: 0417 100 796 or fax: 9601 4101 or email: mick@foisolutions.com.au

Your feedback about the Newsletter would be most welcome, as would suggestions about what you would like to see covered in future Newsletters.

Solicitors & Consultants
Level 5
105 Queen Street
Melbourne Victoria 3000

DX 345
Melbourne VIC
Email mick@foisolutions.com.au
www.foisolutions.com.au

Telephone (03) 9601 4111
Facsimile (03) 9601 4101
(03) 9601 4121
Mobile 0417 100 796