FOI SOLUTIONS

CLIENT NEWSLETTER
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RECENT CASES (VIC)

Ability to refuse requests

In *Lloyd and Victoria Police*, the Tribunal confirmed that a request can only be refused on the basis that it is voluminous prior to it being processed and prior to any deemed refusal (which is appealed in VCAT). This provision can only apply to whole and not part of requests, as it is intended to allow an agency to refuse a request if it would unreasonably and substantially divert their resources. However, three steps must be taken by the agency before a request can be rejected:

* The agency or Minister must give the applicant notice stating his, her or its intention to refuse the request, and nominating an officer with whom the applicant may consult;
* The agency or Minister must give the applicant a reasonable opportunity to have that consultation;
* The agency or Minister must give information to assist the applicant to make the request in a form that would remove the grounds for refusal. The effect of s25A(7) is that the clock (which sets the time limit within which a decision on the request must be made) stops while these three things happen.

Cabinet documents exemption – submission to cabinet and draft documents

In *Dalla-Riva and Department of Treasury and Finance (No.2)* PriceWaterhouseCoopers were commissioned by the government to compile a report on the Mitcham Frankston Freeway. Therefore, whether the persons creating the document knew that it was to go before Cabinet for deliberations was irrelevant; of concern was the state of mind of the commissioning party. The Tribunal took the opportunity in this case to affirm the general principles that shape the cabinet documents exemption. They are:

* The application for exemption turns on the purpose for which the document was prepared;
* The actual use made of that document may be relevant but is not determinative of that question;
* Cabinet deliberations must be the sole or substantial purpose for the document coming into existence;
* If the document is created by an external consultant, it is the person who commissioned the document rather than the document's creator that must be aware of it's ultimate purpose; and
* The document must be created for Cabinet consideration

In *Dalla-Riva and Department of Justice* the Tribunal held that drafts of documents that later went before Cabinet or were intended to go before Cabinet were exempt under this section. Significantly, there was no proof that the subsequent document actually went before Cabinet. The arguments for these kinds of documents being exempt were 'overwhelming' according to the Tribunal.

[**FOI Solutions acted in this case—for a hotlink to the decision, go to our website: www.foisolutions.com.au**]

Internal working documents

In *McKean and University of Melbourne* the Tribunal stated that the test for public interest under this section involved a "balancing exercise of the aspects of public interest that favour disclosure against those which militate against it." It was also confirmed that the applicant's personal interest is not enough to satisfy the test. [Note: FOI Solutions acted in this case and it is the subject of an appeal to the Supreme Court in relation to s.34(4)(c) of the FOI Act.

In *Dalla-Riva and Department of*

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Treasury and Finance the Tribunal reiterated the statement in *Osland* regarding the public interest reasons for having the exemption. They are:
* The efficient and economic conduct of government;
* Protection of the deliberative process of government (particularly at high levels of government in relation to sensitive matters); and
* The preservation of confidentiality so as to promote the giving of full and frank advice.

The general spirit of these points was confirmed in *Flemington Kensington Community Legal Centre and Victoria Police*, where the Tribunal stressed the importance of senior staff members of government agencies being able to make honest assessments of employees without fear of it reaching the public domain.

Documents that were internal notes to the Executive were exempt under this section in *Dalla-Riva MLC and Department of Justice*. There, documents setting out opinions on funding issues as well as the scope of work to be undertaken were the subject of the application. A further relevant consideration was that the documents were communications at a high level of government.

Legal professional privilege
In *Dalla-Riva and Department of Justice*, one of the documents in question had been drafted by a barrister, thus legal professional privilege was claimed. However, the Tribunal was not satisfied that he was advising in his capacity as a barrister and not as someone who had significant experience in dealing with anti-corruption models. A further problem was that it was unclear as to whether the Department of Justice was "a client of the barrister's in the way in which that term would normally be applied."

Personal affairs information
In the case of *Morse and Building Appeals Board (No.2)* the Tribunal confirmed that the term "personal affairs" is to be interpreted broadly, essentially meaning the "private affairs of an individual."

The disclosure of information that would be 'reasonably likely' to endanger the life or physical safety of any person is deemed to be unreasonable. The Tribunal continued, stating that 'physical safety' extends to the individual's perception of safety; the concept is not limited to actual safety. In the context of the case before them, the Tribunal was satisfied that the applicant would not pose any actual threat to the neighbours, but they believed that he might do something which was significant. As in *Hanson and Department of Education and Training*, the fact that the Tribunal did not believe that the applicant's aim would be achieved by release of the documents.

In *Hanson and Department of Education & Training* the Tribunal held that the information contained in a curriculum vitae constitutes personal affairs information. Whilst the individual appointments are on the public record to a section of the community, *"the collected sum of [the individual's] appointments, the exact starting and ending dates and their order is not information available to the public already…[and]…therefore relates to [the individual's] personal affairs."*

Whether the disclosure of such would be unreasonable, the Tribunal elaborated considerably, stating that they should consider *"all the circumstances of the application, including the Applicant's interest in the information which would be disclosed, the nature of the information, the circumstances in which the information was collected or obtained, the likelihood that the person concerned would not wish to have it disclosed without consent, whether the information has any current relevance and whether any public or important interest would be promoted by release of the information."* The Tribunal added that further relevant factors for consideration are:
* Whether the Applicant's purpose is likely to be achieved by granting him access to the information he seeks; and
* The fact that the applicant's conduct when looked at as a whole had been intimidatory and inappropriate.

This sentiment was supported in *Marke and Victoria Police*, where the Senior Member confirmed that it is unreasonable to disclose information where the person to whom it relates does not want it disclosed.

This case went on appeal to the Supreme Court where Justice Hanson confirmed that this was but one factor to be considered in determining whether disclosure was unreasonable; it was not a determinant factor on its own.

More importantly, in the Supreme Court case Justice Hanson determined that when considering whether disclosure was unreasonable, **it must NOT be considered as if it was disclosure to the world at large**. It must be considered as disclosure to a particular applicant and consideration needs to be given to the likelihood that the information would be published more widely. [**Note:** This decision will be the subject of an application to the Court of Appeal for leave to appeal on 14 March 2008—the outcome will be reported in our next newsletter.]
In *Morse and Building Commission*

the Tribunal reaffirmed that it is important factor against release if the individual involved objects to their information being made publicly available. In coming to this conclusion the Tribunal was influenced by the overall factual matrix of the case, which included an ongoing dispute between the applicant and his neighbours.

The case of *Goldberg and Doe* allowed the Tribunal to confirm that the test for unreasonableness of disclosure involves weighing the competing interests of the individual's right to privacy and the public interest in disclosure. Interestingly, the applicant submitted that the test for unreasonableness was objective. Whilst it was not explicitly stated, it would appear from the findings that the Deputy President did not agree with this proposition.

Documents containing material obtained in confidence
In *Flemington Kensington Community Legal Centre and Victoria Police*, the report in question consisted of material that was provided to the recipient in confidence. It was relevant that whilst not all persons in the report were referred to by name, it was determined that people familiar with the situation would be able to deduce the identities of the unnamed individuals. The Tribunal also considered as part of the overall context, the 'culture' of the working environment in deciding to uphold the exemption.

Public interest override
In *Dalla-Riva and Department of Treasury and Finance*, Judge Harbison confirmed the Court of Appeal decision in *Secretary to the Department of Justice v Osland* (2007) VSCA 96, where the Court held that the power under this section can only be conferred if the Tribunal is satisfied that the public interest considerations leaning toward the granting of access are *"so strong as to override the public interest considerations underpinning the applicable exemptions. The case must, in effect, be irresistible."* Also reinforced was the stringent nature of the test. The case of *Coulson and Department for Victorian Communities* also confirmed the statements in *Osland*.

In *Marke and Victoria Police*, the Tribunal stated that it was not in the public interest that police make *"full, thorough and lengthy"* investigations into each complaint that is made about a possible crime. Such a situation would divert the police resources from performing *"more important duties."*

RECENT PRIVACY CASES (VIC)

A tort of invasion of privacy
In *Doe v Australian Broadcasting Corporation & Ors*, Judge Hampel found that invasion of privacy may in itself constitute a tort. Her Honour stated that such a development is underpinned by the acceptance or recognition of the value of privacy as a right in itself deserving of protection. This, in turn, comes from the law's duty to recognise and protect human dignity.

Whilst clearly indicating that she was not formulating a definition of privacy, Judge Hampel concluded that there had been an invasion of privacy. The information in question was personal or confidential in nature which the plaintiff had a reasonable expectation would remain private. The nature of the information under consideration, identifying an individual as a victim of sexual assault, is information which can be characterised as information which the person to whom it relates has a reasonable expectation would remain private.

Disclosure of general information, implied consent and administrative errors
In *Z v Eastern Health*, the Tribunal held that s 120A(3)(c)(i) of the *Mental Health Act* 1986 authorised disclosure of information concerning a patient's condition if the information is in general terms and may include advice as to whether the patient's condition was stable, whether the patient had been discharged or was comfortable. Information about long term prognosis is unlikely to be included in the scope of that term.

The Tribunal held that Z's failure to object to the third party (her cousin) presence amounted to an implicit consent to her being there. Prior to reaching this conclusion the Tribunal had been satisfied that Z was able to express her preferences at the interview. However, it would have been preferable for the psychiatry registrar to have asked Z in advance of the interview if she was consenting to the presence.

Importantly it was held that certain information was able to be disclosed to the Office of the Public Advocate in order to lessen or prevent a serious threat to the welfare of a third party. Z alleged that her pri-

vacy was breached when the defendant contacted the wrong next of kin. Z's cousin had been her contact in 1997, but in 2000 she changed the nominated person. Unfortunately the details were not changed on all the computer systems involved. The Tribunal did not find this to be a breach of privacy.

RECENT CASES (COMMONWEALTH)

In *Chu v Telstra Corporation Ltd* the applicant, a former Telstra employee, sought access to copies of his personal or personnel file. The evidence showed that Telstra only commenced centralisation of its record management system in early 1994 and by 1999 the system only part of the system was centralised. The Tribunal held that an electronically based search of the non centralised system was enough to satisfy the 'all reasonable steps' requirement.
[**Note**: This was the second time this matter was before the AAT having been remitted by the Federal Court on appeal. The 2007 AAT decision is the subject of an appeal to the Federal Magistrates Court which will be heard later this year.]

In *Australia Post v Johnston*, the Tribunal confirmed a broad scope for the term 'commercial activity.' It can be regarded as an activity which 'reflects a business venture with a profit making objective and, strictly speaking, would involve activity to generate trade and sales with a view to profit.' A document may be exempt if it is brought into existence primarily for the purposes of the commercial activity, even though it may serve non commercial purposes.

In the recent case of *Bienstein and Attorney-General (Commonwealth of Australia)*, the applicant sought access to all documents that had come into existence 'because of her' and her dealings with any branch of the government. It was held that the Tribunal had no power to direct the Attorney-General or the Justice Minister to make a decision where one has not been made; the Tribunal merely has the jurisdiction to review the decisions deemed to have been made by the Attorney-General and the Justice Minister.

NEW STAFF WELCOME

Since our last newsletter, FOI Solutions has continued to grow at a steady rate and is proud to announce the addition of the following new staff:

* Fahna Ammett, Senior Associate (April 2007);
* Susannah Whitty, Solicitor (January 2008);
* Elizabeth Chase, Law Clerk (February 2008);
* Adrian Spataro, Law Clerk (March 2008).

The additional staff have allowed FOI Solutions to continue to be a pre-eminent provider of legal and related services in the freedom of information, privacy and other administrative law fields.


Fahna Ammett


Susannah Whitty

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Web site

Be sure to visit our web site at *www.foisolutions.com.au*. We would love to hear any comments or feedback, positive or negative, about it. Any suggestions for improvement would also be welcome. It will be updated on a regular basis, so don't forget to come back often.

FOI and Privacy

This will be the home of a new regular feature for our newsletters where we invite you to write to FOI Solutions with any freedom of information or privacy query and, if your query is chosen, we will answer the query directly to you free of charge and publish your question and our answer in the newsletter. When you ask your question, please refer to the fact that it is asked under this newsletter heading. *Please note that by submitting a query you will be taken to consent to your name, organisation and query being published in a future newsletter*.

Forthcoming Training

FOI Solutions has published its training and seminar timetable for the first half of 2008. This includes a number of rural training session to accommodate those who cannot make our regular session in Melbourne.
Details of the training timetable is available on our web site: *www.foisolutions.com.au*
Click on the "Training" button

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.

Don't forget our FOI and Privacy VCAT decision summaries are available to keep you up to date with developments in this area. If you are interested in purchasing a copy (back issues are also available), log on to our web site and click on the "Publications" button for more information—www.foisolutions.com.au

Best of luck with your FOI & Privacy work in 2008!!

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