

**RECENT CASES (VIC)**

*Smeaton v Victorian WorkCover Authority* confirmed previous decisions that held the Tribunal has jurisdiction under s27 to decide a search was insufficient or that an alleged inability to locate documents was actually a refusal.

The case also reiterated that a statement of non-existence of a document may amount to a refusal, and the Tribunal has power to review this kind of response. Thus it can decide whether a search for documents was adequate and thorough. This is not exclusively a matter for the Ombudsman.

Also, s52(a) gives the Tribunal power to do things other than review a refusal to grant access, including that no sufficient searches had been done.

In *Zeqaj v Victoria Police*, the Tribunal outlined how the ref-

erence in s17(2) to ‘such information’ means applicants must give reasonably specific particulars enabling the relevant (FOI) officer to identify the requested document, it is not for an officer to try and gauge from a request what an applicant may be getting at.

However FOI officers were not relieved of any obligation to the applicant where there was some doubt as to what documents were sought, but it was still the applicant’s responsibility to strive to define with as much precision as they can what they want.

The applicant must also be given assistance under s17(3) to make the request comply with s17(2) and under s17(4) the application could not be refused before the applicant was given a reasonable opportunity to consult with the relevant agency to make a valid request.

*McIntosh v Victoria Police* appears to have decided that the respondent was unable to request the Tribunal to substitute for a deemed refusal its actual decision to refuse access pursuant to s25A, under either s53(5) of the FOI Act or ss97, 98 or 80 of the VCAT Act.

*Smeaton v Victorian WorkCover Authority* examined summonses to certain witnesses. The decision to set aside all three summonses in that case highlighted the Tribunal’s reluctance to allow such summonses when they were an abuse of process.

**Internal Review**

*Smeaton v Worksafe Victoria* reminds us that a request for internal review is a condition precedent to review by the Tribunal under s50(2).

**Requests for Documents**

If a request is for ‘schedules and supporting documents’ relating to accounts, the fact that no such schedules or supporting documents pertain to the accounts does not make the request unclear (*O’Brien v Department of Justice*).

*O’Brien* also established that applicants need not have knowledge of what an agency does or

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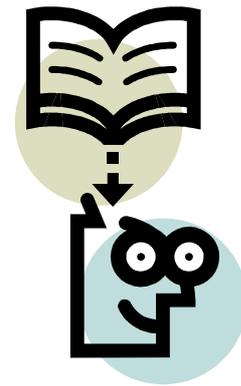
is not doing in a certain area; indeed the purpose for requests under the FOI Act is to gain such answers.

### **Exemptions under s28(1)**

*Landes v VicRoads* explored the meaning of recommendations and advice, and deliberative processes, under s30(1). Deliberative processes are those of reflection and thinking.

### **Draft and incomplete documents**

The Tribunal held in *Yarra City Council v Roads Corporation* that draft and incomplete documents were exempt under s30(1)(b) on the basis that release could reveal views, policies and determinations ultimately not taken or held. This was especially the case where the final version of the document had been publicly released.



## RECENT PRIVACY CASES (VIC)

*Carvill v Casey City Council* held that access to information relating to planning proposals is not covered by the *Information Privacy Act*.

The Tribunal emphasised that it did not dismiss the claim based on the fact that the Applicant had not given particulars of his claim to the Tribunal as required, since he later particularised the complaint at the hearing.

While the Respondent did know the personal information in this case, it was not obtained from personal information held by the Respondent agency.

*Tomasevic v Entwisle* concerned a claim under the *Health Records Act 2001* that an inaccurate and

incomplete medical report was a breach of the Health Privacy Principle 6.5.

The case outlined a number of principles, including that practising medical practitioners came within the definition of ‘organisation’ in s18, and that the doctor assessing the applicant was providing a ‘health service’ as per s3(1) when he provided a consultant psychiatrist’s report in relation to a medical condition.

The Tribunal reiterated that if the medical report was ‘inaccurate, incomplete, misleading or not up to date’, the respondent would have to take reasonable steps to correct the information to comply with that obligation. The Tribunal highlighted in

its decision that the report was inaccurate, and had serious consequences for the applicant. To form an accurate, complete and up-to-date view about the applicant’s medical and other history, the events that transpired after the report was made had to be taken into account.



## RECENT CASES (COMMONWEALTH)

### Search for documents

In *Hanna v Commonwealth Ombudsman*, the Tribunal reiterated that submissions about the existence or the whereabouts or the fate of documents that are speculative will not persuade the Tribunal that any further searches are reasonably required or justified, especially when proper, thorough and adequate searches have already been undertaken and to go further would require auditing all files.

The Tribunal reiterated in *Van Der Boor v Centrelink* that criticisms of record keeping procedures and an agency's processes are not related to the issue of whether or not adequate searches had been made, and that if all reasonable steps were taken to find the relevant documents it was not reasonable to require an agency to audit all files in the relevant offices.

### Privilege

*Liberal Party of Australia v Australian Electoral Commission* concerned documents of advice on legal issues relating to the registration of political parties and exemptions claimed based on legal professional privilege under s42. The Tribunal applied principles outlined by the High Court in *Mann v Carnell* (1999) 201 CLR 1 and *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 regarding

waiver of legal professional privilege.

It reiterated that waiver only occurs when there is inconsistency between the client's conduct and maintenance of confidentiality. It does not matter that it did not intend to waive the benefit of the privilege and considerations of fairness and the circumstances of the case are to be taken into account. If the substance and effect of the advice is communicated in the context of emphasising and promoting the strength and substance of an argument being advanced by the recipient of the advice, waiver of privilege is implied.

The Commission's statement of the effect of its legal advice and its reliance on it in reaching its Statement of Reasons led the Tribunal to find it waived its legal privilege.

In *Garners Beach Habitat Action Group v Department of the Environment, Water, Heritage and the Arts and Others*, the AAT stated that as a practical matter, an application for a ruling on whether already fully released documents should have been released in any event is futile and should be dismissed as vexatious, because the Tribunal's focus is on producing correct or preferable decisions rather than inquiring into general processes.

The case also highlighted that 'individual' in s41 is usually taken to refer to a natural person and that s41 was intended to protect the privacy of individuals, not organisations.

### Procedural decisions

In *Wolfe v Telstra Corporation Limited*, the Tribunal examined whether an applicant had failed to prosecute her application so that it should be dismissed pursuant to s42A(5) of the *Administrative Appeals Tribunal Act 1975*.

It decided that the applicant failed to proceed with her application within a reasonable time, taking into account her apparent loss of interest in the proceedings, earlier attitude of non-cooperation, subsequent disinterest and lack of credible or reasonable explanations for her failure to progress the application for 5 years. It noted that it was not necessary to determine what a reasonable time might have been, and the prejudice that would be suffered by the respondent due to the additional delay also influenced the decision to exercise s42A(5) to dismiss the proceeding.



## S41(1)

In *Einfeld v Human Rights and Equal Opportunity Commission*, the AAT noted that documents that revealed nothing about the current workings of government or the administration of travel policies would not contribute to the public gain if disclosed.

It also noted that documents containing details of expenditure by Applicants should not be disclosed in the absence of some public interest.

The Tribunal also held that it could be inferred that documents marked 'personal and confidential' were made on the

basis they would remain confidential and were intended to be confidential.

The AAT also followed a number of principles from an earlier case, including that unreasonable disclosure arguments for s41(1) must have as their core public interest considerations, of which personal affairs exemption is an example. It also emphasized, following that case, that it is relevant that the documents were supplied on the basis that they remain confidential and that their disclosure would cause embarrassment or distress to the people to whom the information or opinion related. Whether the

information had any current relevance was also a factor to be considered.

According to the facts of the case, the Tribunal also stated that the details had a personal element but related to the expenditure of public money by a senior official and therefore had a public interest dimension. Also, the fact that documents were marked 'personal and confidential' was not determinative of the public interest question, nor was the fact that some of the documents forming part of a series were missing.

## NEW STAFF WELCOME

Since our last newsletter, there have been changes in FOI Solutions personnel. FOI Solutions is proud to announce the addition of the following new staff:

- Emma Burn, Law Clerk (July 2010)
- Amy Hu, Solicitor (August 2010)
- Mel Togliaso, Administration Officer (August 2010)

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.

## WEB SITE

Be sure to check our website for information on our training and legal services offered.

Visit our web site at [www.foisolutions.com.au](http://www.foisolutions.com.au) where you will find hotlinks to cases in which we have acted. We would love to hear any comments or feedback, positive or negative, about our website. 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 Q&A

If you have any questions you would like answered in the newsletter please email us:  
[mick@foisolutions.com.au](mailto:mick@foisolutions.com.au)

## FORTHCOMING TRAINING

FOI Solutions conducts a number of training sessions and lunch time seminars throughout the year.

Details of the training timetable for the first half of 2011 and our registration form will be available soon on our web site: [www.foisolutions.com.au](http://www.foisolutions.com.au) under the “Training” option.

## FURTHER INFORMATION

If you would like any further information about the matters raised in this Newsletter or any assistance with FOI or privacy 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](mailto:mick@foisolutions.com.au)

Your feedback about the Newsletter would be most

Welcome, as would 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](http://www.foisolutions.com.au)

The 2009 summaries are currently available and the 2010 summaries will be available early in 2011.

Best of luck with your FOI & Privacy work for 2011. With the change in Government in Victoria there will no doubt be some changes to come.

*Professional Excellence in Administrative Law*

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