

RECENT CASES (VIC)

Internal working document

In *Bremner v LaTrobe City Council*, an options paper was deemed to contain opinion and advice due to its very nature, hence making it an internal working document that if released would disclose matter exempt under s30.

Mann v Medical Board of Australia made it clear that not all of the material has to fall within s30(1)(a) for the document to be exempt, as long as the other material was so intertwined with the opinion and deliberation that releasing parts of the document not falling within s30(1)(a) would be misleading, confusing and not make proper sense.

Public interest

Factors in *Bremner v LaTrobe City Council* that made it contrary to public interest to re-

lease a document included the high sensitivity of the issue it related to, its being created at a very early stage in the development process, and the confusion, debate and mischievous interpretations that could follow due to the possibilities discussed in the document.

In *Mann v Medical Board of Australia*, the Tribunal held that disclosure of the name of an author of a file note relating to an investigated medical procedure would not aid in exposing improper investigations into the incident or make them more accountable. The Tribunal also emphasized the limited extent to which the documents sought would aid the applicant in question and the frankness and candour in making future decisions that would be impacted, in deciding that releasing the documents would be contrary to public interest.

Unreasonable diversion

The Supreme Court in *Chief Commissioner of Police v McIntosh* held that the time that an FOI unit would take to process the request ought to be taken into account in deciding whether processing it would substantially and unreasonably divert the resources of Victoria Police from its other operations under s25A(1)(a).

‘Other operations’ was held to refer to all of the other things an agency does apart from dealing with and processing *the* freedom of information request, including dealing with and processing other FOI requests. Thus, the performance of the relevant tasks by any resources of the agency are to be taken into account.

The court also reminded that the requirements of s25A(1) are not easily satisfied and it should only be applied in clear cases of substantial and unreasonable diversion.

Cabinet documents

State Owned Enterprise for Irrigation Modernisation in Northern Victoria (trading as *Northern Victoria Irrigation Renewal Project*) v *Manners* concerned a claim for exemption of a program plan document under s 28 (1)(b) of the FOI Act regarding

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the upgrading of the irrigation infrastructure in the Goulburn Murray district of Victoria.

The Supreme Court held that the Enterprise was an 'agency' for the purposes of the section, and reiterated that it is sufficient if the purpose the document was prepared for was for submission to Cabinet for consideration was the dominant purpose or one of a number of significantly contributing purposes.

The court held that while the dominant purpose of preparing the document was something else, it did not exclude other substantial contributing purposes.

It also stated that where a document was prepared for a substantial purpose of submission to Cabinet for consideration, the preparation and submission of an executive summary of the document, and not the full document, did not alter the purpose for which the document was prepared. Submission of the executive summary only would usually be taken as submission of the whole document.

Public interest override

An argument in *Bremner* that release would promote trust in the relevant authority was not a sufficiently high-threshold public interest for s50(4) to be exercised to override the exemption and require disclosure.

In the *Mann* case, the Tribunal noted that the s50(4) test is stringent and imposes a high threshold, and requires factors strong enough to override factors that make a document exempt in the first place.

FOI Solutions acted for the Department of Justice in *Western Suburbs Legal Service Inc v Department of Justice* where the Tribunal considered s 50(4). The Tribunal noted the High Court decision in *Osland v Secretary, Department of Justice* (in which FOI Solutions acted for the respondent) has interpreted this section as imposing two conditions on the Tribunal .

First the Tribunal must consider whether the material before it is capable of supporting the formation by it of an opin-

ion that the public interest requires that access to the documents should be granted.

Secondly, the Tribunal must actually form the opinion that the public interest requires that access to the documents should be granted. This is an evaluative and essentially factual judgment.

The Tribunal also referred to the High Court's statement that the word "requires" which appears in s 50(4) directs the decision-maker to identify a high-threshold public interest before the power can be exercised. It is not enough that access to the documents could be justified in the public interest.

The Tribunal considered each of the matters put in support of the submission that the public interest requires release of the report and was not satisfied that it does. Even combining each of them in any way or taking them all as a whole, the Tribunal was still not satisfied that the public interest requires release.

Note: at the time of preparing this note the applicant was seeking leave from the Supreme Court to appeal the decision.

RECENT PRIVACY CASES (VIC)

In the case of *Den Brinker v Maxwell Jackson Group Pty Ltd* the VCAT reiterated some points in relation to proceedings under the *Health Records Act 2001* and the operation of that Act (which, in our view, would also have application under the *Information Privacy Act 2000*):

- The onus is on an applicant to prove his or her case was more probable than not than the respondent's case - the standard of proof was on the balance of probabilities.
- The privacy legislation does not instruct as to

how a document should be researched, prepared and written. It is concerned with the completeness of the specific health (personal) information collected, used, held or disclosed in the document.

- Information about the physical, mental or psy-

chological health of the individual or about the services provided to him was health information. References in the document identifying the father of the individual were not health information about the individual. References to dealings the parents had with the health service provider were also not health information about

the individual.

Where personal information is defective, it is appropriate for the Tribunal to order that a notation be placed on the file requiring other documents to be read in conjunction with the report in question because those additional documents would enable the reader of the report to obtain an accurate, complete and up-to-date ac-

count of the patient's health information in the relevant respects (*Tomasevic v Entwisle*).



RECENT CASES (COMMONWEALTH)

Personal information

The Tribunal has held that for the purposes of FOI requests that refer to documents in relation to a certain address, 'address' simply means a place where one can be reached, whether or not they live there (in *Webb v CEO, Centrelink*)

Searches for documents

If those charged with the task of locating documents requested under the Act fail to properly identify the class of documents the subject of the request, it generally could not be said that all reasonable steps have been taken to locate the requested documents.

Therefore it is important for there to be a clarity in understanding what the request was for .

Further, in determining whether all relevant steps have been taken to locate the requested documents, a relevant factor to be taken into account is the class of documents that might be reasonably expected to exist (*Edwards v Secretary, Department of Health and Ageing*).

Legal professional privilege

In upholding a claim for exemption on this basis the Tribunal in the *Edwards* case emphasised that provided the advice from an internal lawyer

had the necessary quality of being independent advice, there was no need necessarily for the lawyer concerned to hold a current practicing certificate.

Irrelevant information

In determining whether information could reasonably be regarded as irrelevant to a request, it is necessary to consider whether disclosure might reasonably, as opposed to irrationally or absurdly, be looked upon as irrelevant to the request for access (*Edwards*).

Section 22 does not apply where a whole document is irrelevant to a request; it only applies to agencies deleting irrelevant or exempt material from documents falling within requests for access.

Web site

Be sure to check our website for information on our training and legal services offered. Register early for any training or seminar sessions as they tend to fill quickly.

Visit our web site at www.foisolutions.com.au where you will find hotlinks to cases in which we have acted as well as other helpful information.

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 Q&A

If you have any questions you would like answered in the newsletter please email us: mick@foisolutions.com.au and refer to the fact you would like your question answered in the next newsletter.

Forthcoming Training

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

- Basic FOI training for FOI decision makers
- Intermediate FOI training for FOI decision makers
- FOI for health information

Details of some of our training timetable for 2011 and registration forms are available on our web site: www.foisolutions.com.au under the “Training” option. Come back often as we are adding new sessions frequently.

If you have a particular topic you would like covered in a future training session or lunchtime update, please drop a line to our Executive Director: mick@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 or other administrative law 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 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

“Publications” button for more information
www.foisolutions.com.au.

The 2010 VCAT case summaries have been finalised and are now available.

Best of luck with your FOI & Privacy work for the remainder of 2011!!

Solicitors & Consultants

Level 2
155 Queen Street
Melbourne Victoria 3000

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

Telephone (03) 9601 4111
Facsimile (03) 9601 4101