

RECENT CASES (VIC)

Internal Working Documents

In *Smeaton and Victorian Work-Cover Authority* the Tribunal stated the test for public interest under this section involved a consideration of all the circumstances and balance the factors in favour of disclosure against the factors against disclosure. The Tribunal affirmed the principle that there is a public interest in protecting the deliberative process of an agency and preserving the confidentiality of those processes so as to promote the giving of full and frank advice.

Public Interest Override

Statements by the Court of Appeal in the *Osland* case constitutes settled law in relation to the exercise of the discretion in section 50(4) – those findings had not been diminished in any way by the High Court. Recent cases continue to affirm how stringent the test is in the public interest

override. FOI Solutions acted in this case.

As reiterated in *McDermott and Victoria Police* the Tribunal must be persuaded that the public interest demands or compels or necessitates the release of the documents and feel it has not practical alternative but to release them in order to appease or satisfy the public interest. The Tribunal in *Asher and Department of Premier and Cabinet* noted “there is a high bar set for the applicant by the need to demonstrate that the public interest requires release of the documents.” In *Currie and the Building Commission* the Tribunal stated the test ‘must, in affect, be irresistible’. FOI Solutions acted in this case.

An ‘Unreasonable’ Disclosure

The Tribunal in *Bailey and Victoria Police* appeared to accept that when considering whether disclosure would be unreasonable, all

the circumstances surrounding the document’s creation or existence should be considered including:

- Whether disclosure would be reasonably likely to endanger the life or physical safety of any person (s 33 (2A))
- The nature of the information in the document, how it was obtained and its availability to the public
- The identity and attitude of the author
- The identity and motive of the applicant
- The possibility that the applicant, upon disclosure, would pursue third parties inappropriately and cause them needless stress

“Voluminous” requests

In *McIntosh v Victoria Police* the Tribunal noted that s 25A (2) does not contain an exhaustive list of factors to be considered when determining whether a request for access is a substantial and unreasonable one. The resources used to identify, locate or collate requested documents as well as the resources used to examine the documents and consult about the request are all matters that can be taken into consideration under s 25A(2). The Tribunal found that:

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- Only *estimates* of resources to be expended are necessary, because obtaining exact figures would mean doing the actual work s 25A(1) was designed to prevent
- Overall, overwhelming proof is not required on the respondent's behalf because such proof could only be provided upon the actual processing of a request
- The meaning of the terms 'substantially' and 'unreasonably' within s 25A(1) are not precisely defined in the Act
- The onus is on the respondent to prove its claim that a request is an unreasonable diversion request.

Personal Affairs

Both *Pritchard and Victoria Police* and *Bailey and Victoria Police* confirm that information relating to the personal affairs of a person may consist of that person's opinions and observations about a second person. In *Bailey and Victoria Police* the relevant document was an email stored on the file of an unsuccessful candidate in the force's recruitment process and related to claims made about his mental health. The disclosure of the email would reveal to the applicant the author's identity, more so than it would to any casual reader.

In *Morgan and Port Phillip City Council* the Tribunal held that section 33(9) applies to all natural persons, regardless of whether they are agency of-

ficers engaged in the performance of their duties. Names of employees of agencies are considered to be personal in nature. A reading down of this provision to exclude agency officers is impermissible. FOI Solutions acted in this case.

Exposing the agency (engaged in trade or commerce) unreasonably to disadvantage

In examining whether a document containing information of a business, commercial or financial nature exposed the Council unreasonably to disadvantage, the Tribunal in *Gibson and Latrobe City Council* accepted that this exposure would be 'likely' if it were 'probable, such as well might happen or be true'.

Disadvantage in this context means in a business, commercial or financial sense and can occur where it reduces an agency's capacity to compete in a market or to negotiate future contracts. In this case, the disclosure of certain documents would likely to expose the Council to disadvantage because it could adversely affect any possible future tender process and that would amount to unreasonable disadvantage. FOI Solutions acted in this case.

Documents of an agency

In determining whether or not the personal diaries of the respondent's board members are 'documents of an agency', the Tribunal in *Guy and Growth Areas Authority* found that

one must look at the document's use or purpose to determine whether it is in the agency's possession (including constructive possession) or whether it is in the possession of an agency's particular officer in a personal or another capacity. The former document would be a document of an agency and therefore subject to the Act.

In this case the board members had no obligation to record the respondent's business in their diaries. The mere fact that an officer of the agency has done so does not mean the diaries constitute 'documents of an agency'. The diary entries were recorded in a personal capacity. Further, the members were part time members who performed other roles and activities outside of the Authority and the diaries were not issued by the agency.

The applicant argued that the diary entries, being parts of the diary, were documents of an agency. However, the Tribunal noted that no provision was raised from either the *Public Records Act* or the *Freedom of Information Act* to support the view that the diary entries, containing records made by an agency's officers, can bear a separate status as an individual public document.

Documents containing material obtained in confidence

In determining whether disclosure would be contrary to the public interest on the ground that it would be reasonably likely to impair the agency's ability to obtain similar future in the future, the Tribunal in *Debono and Department of Justice* found it was nec-

essary to show that this type of information would not be forthcoming. It is not sufficient to show that third party informants would be less candid or forthcoming or that they would be inhibited from reporting frankly.

Here, the Tribunal found that third party informants would not be likely to be forthcoming with information about prisoners incarcerated for violent criminal offences if the reports were released. The informants would not have the same duty to report as the clinicians involved in the violence treatment program.

In *Barbaro and Victorian WorkCover Authority* found information communicated in confidence remains confidential even though it may turn out to be false or unjustified. Accordingly, the complainant's allegation of an unsafe workplace against the applicant that was later unsubstantiated remained confidential.

Unreasonable Disclosure of Information relating to the Personal Affairs

The Tribunal in *Morgan and Department of Human Services* relied heavily on the s 53A notification process in finding that disclosure of the personal affairs information was unreasonable where individuals opposed release, but was not unreasonable where the individuals consented to disclosure or did not respond to the s 53A process. FOI Solutions acted in this case.

This was the first decision to apply the Court of Appeal decision in *Victoria Police v Marke* which considered how one determines whether disclosure is "unreasonable" under s 33. It adopted wholly submissions by FOI Solutions as to the correct application of the *Marke* decision including the following points:

- Disclosure is to a particular applicant – it is wrong to assume that disclosure is *in*

fact to the world at large, but *potential* disclosure to the world at large is clearly relevant.

- The test of unreasonableness requires a balancing of interests.
- There is no power for an agency to grant conditional access – that is repugnant to the Act.
- The loss of control of information in a document, potentially to the world at large, is an important consideration for any decision maker and a decision maker can approach the balancing exercise with the assumption firmly in place that once a document is made available, it has the potential to be disseminated widely. All facts which relevantly, logically and probatively bear on the question of unreasonableness must be taken into account.

[FOI Solutions is conducting lunchtime seminars about this case— for more information or to register visit the 'Training' link on our website: www.foisolutions.com.au]

RECENT PRIVACY CASES (VIC)

In *O'Neill v Building Commission* it was noted that 'the Act must be seen as remedial or beneficial legislation and thus the definition of personal information should be interpreted broadly and that exclusions from the definition should be construed narrowly'. An individual's personal information would not be confined simply to matters such as name, address and date of birth.

Nevertheless, the Tribunal found the emails sent by the respondent did not contain 'personal' information about an individual. The email contained information about the investigation of an individual: information about steps undertaken by the respondent's authorised officer in relation to the investigation of the applicant. FOI Solutions acted in this case.

In *Morgan v Inner South Community Health Services Inc.* the Tribunal was unable to find any provision that would prevent the respondent from obtaining information of any kind concerning the applicant, without the applicant's consent. The decision confirms that the procedure in s 33(4) of the FOI Act is mandatory once a document sought by an FOI applicant contains health information about the applicant. FOI Solution acted in this case.

RECENT CASES (COMMONWEALTH)

Dismissal of application for review without a hearing or decision

While individuals are granted the right to seek review of a decision under the *Freedom of Information Act 1982* (Cth), this right is conditional. There are a number of provisions under which an application for review may be dismissed.

In *Wagh v Australian Postal Corporation*, the applicant sought access to a number of documents. Among many other issues, the Tribunal considered whether the application for review should be dismissed, on account of the applicant's non-compliance with Tribunal direction. In order to do so, the Tribunal needed to assess whether the actions of the applicant constituted more than a casual disregard of Tribunal procedures. Prior to this

hearing, the applicant had failed to attend two Tribunal Hearings, even though on the second occasion he was warned, by a letter from the Tribunal that non-compliance could result in dismissal, and failed to prepare submissions even though he was provided reasonable time to do so. The Tribunal was of the view that these actions were in fact more than a casual disregard of Tribunal procedures, and dismissed Mr Wagh's application for review pursuant to s42A(2)(a) and s 42A(5)(b) *Administrative Appeals Tribunal Act 1975*. FOI Solutions acted in this case.

Seeking Costs Order

In *Chu v Telstra Corporation Ltd* the applicant, a former Telstra employee, sought access to copies of his personal or personnel file. The Federal Magis-

trates Court dismissed the appeal. Further, costs for opposing the application for leave were awarded to the respondent, on the basis that the applicant should have and could have, raised the matters in the post hearing submission, prior to the commencement of proceedings.

In *Duncan v Chief Executive Officer, Centrelink*, both parties were invited to make submission on costs. In determining whether costs should be granted, the court weighed the reasonableness of the applicant bringing the claim, against the need for clarification of the law in dispute. The Federal Court ordered that the applicant pay 60% of the respondent's costs on the basis that he took a litigious course, even though he knew it was doomed, as two of his three claims were struck out at the first hearing.

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:

- * Mohammed Khelil, Law Clerk (August 2008);
- * Minh Le, Law Clerk (September 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.



Mohammed Khelil



Minh Le

Professional Excellence in Administrative Law

Web site

Be sure to visit our web site at 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 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 will be conducting a number of training sessions and lunch time seminars throughout 2009. Lunch-time seminars will be conducted on the following topics:

- FOI Transfer and referral of requests
- FOI Consultation
- Markets 33

Half day training sessions will be conducted on the following topics:

- Information Management Framework
- Privacy
- Building and Planning Interaction
- FOI for Health Services
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Details of the training timetable and our registration form is available on our web site: 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 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. The 2008 summaries will be available soon.

Best of luck with your FOI & Privacy work in 2009!!

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