FOI SOLUTIONS

CLIENT NEWSLETTER
Volume 8, Issue 2 2009

RECENT CASES (VIC)

Victorian Charter of Human Rights and Responsibilities

Kracke and Mental Health Review Board was in many respects a test case although the ramifications of the decision are widespread.

Relevant is the approach which the VCAT took to interpreting and applying the Charter. The VCAT outlined three broad steps:

Engagement: This involves questioning whether the legislation in question limits human rights using standard interpretation methods.

Justification and Proportionality/ Reinterpretation: if it is found that the legislation does limit human rights, is the limit proportionate and justified by reference to s 7(2) of the Charter? If the limitation is not justified is it possible to interpret the legislation compatibly with human rights under the special interpretive obligation in s 32(1)?

Declaration of inconsistency: if it is not possible to re-interpret the legislation, should a declaration of inconsistency be made?

In relation to each of the above steps the VCAT referred to international jurisprudence such as the UN Human Rights Committee and the European Court of Human Rights as well as from other Commonwealth countries.

Victorian Charter of Human Rights and Responsibilities and the FOI Act

In *Smeaton and Victorian WorkCover Authority* it was submitted that ss 32 and 38 of the Charter, which require the interpretation of legislation to be compatible with human rights, require that the FOI Act be interpreted in light of s 15 of the Charter.

The Tribunal held that the applicant's right to freedom of expression was *not engaged* in this case as nothing in the FOI Act limits his right to hold or express opinions or to seek receive or impart information. That is, seeking access under the FOI Act, subject to exceptions and exemptions in the FOI Act, is not inconsistent with the right of freedom of expression in the Charter.

Lastly, in *Marke and Office of Public Prosecutions* the Tribunal held that it is difficult for the *Charter of Human Rights and Responsibilities Act 2006* to have a bearing on the interpretation of s 50(4) given that the Charter deals with *individual* rights whereas s 50(4) focuses on the interests of the *public as a whol*e.

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Jurisdiction under the FOI Act

Both *Wooldridge v Department of Human Services* and *McIntosh v Victoria Police* rejected the contention that an applicant is merely requesting *information* rather than *documents* when he/she directs the respondent as to the manner in which to conduct its searches.

In *Wooldridge* it was held that a request for *a copy of the results generated* by certain searches as an electronic document management system is a request for *a document* and is therefore a valid request. The Tribunal was of the view that to focus on the applicant's directions is a 'distraction' as the applicant was simply making the request clearer. The request falls within the scope of s 19 requiring the creation of a document, by the use of a computer, where it appears that the requested information is not available in discrete form.

In *McIntosh v Victoria Police* it was held that the fact that the applicant does not know the contents of the list requested, and whether his interest goes further until he received the list does not invalidate a request. An applicant is entitled to make a broad request provided that it enables the agency to identify the documents. It was implicit in the Tribunal's judgment that the request was not viewed as a broad fishing request. The request for a list was not so broad as to be regarded as so vague that it could not be processed. Further, the Tribunal held that the request for *a list of documents* contained in several electronic folders is a request for 'document'.

In the slightly earlier case of *McIntosh v Department of Justice* the VCAT rejected an earlier test that there is no compliance with s 17(2) unless the request allows a respondent, as a practical matter, to locate the documents within a reasonable time and with the exercise of reasonable effort.

The Tribunal found that s 17 (2) is concerned with the provision of sufficient information to identify the documents requested.

To add a requirement that there be sufficient information to allow a respondent to locate the documents '*within a reasonable time and with the exercise of reasonable effort'* would imply additional requirements before a request can be considered valid and was contrary to the objects of the FOI Act.

Judicial function of a Court

In *Seamen v Department of Justice* the Tribunal needed to discern whether it had jurisdiction to hear the matter. The transcript of the judge's charge to the jury was prepared by the Victorian Government Reporting Service (VGRS). As the work of preparing transcripts is controlled by the County Court, then the VGRS was considered an officer of the court, and was exercising a judicial rather than public function at the time the transcripts were being produced. As such the Tribunal was held to lack jurisdiction to review the decision of the respondent.

Standard of Evidence

The standard of evidence required in a freedom of information matter was discussed in *Kotsiras v Department of Victorian Communities.* The Tribunal reiterated the need for sufficient evidence to establish an exemption under s 30 (1). A statement that a document *"appeared"* to a witness to be prepared internally, and provided to external legal advisers, indicated uncertainty as to the intended recipient of the document, and thus the exemption was not made out.

Internal Working Documents

The scope of the term *"officer"* was disputed in *Mees v University of Melbourne.* The Tribunal held that the term *"officer"* was wide enough to include consultants and independent contractors employed by the agency, as such an opinion that could be taken as a 'personal view' would be covered under the expression of 'opinion, advice or recommendation'. FOI Solutions acted in this case.

In *Asher v Melbourne Water* it was held that a draft table of preliminary work that was later refined for the Board's consideration would disclose matters in the nature of advice and opinion prepared by an officer as part of the respondent's deliberative processes. FOI Solutions acted in this case.

Contrary to the Public Interest

The Tribunal in *Kotsiras v Department of Victoria Communities*

the Tribunal ordered the disclosure of a document that was '*merely a draft document'* as it could not see that disclosure would be contrary to the public interest, as release is unlikely to create mischief, confusion or unnecessary debate.

On the contrary, in *Mees v University of Melbourne* the Tribunal held disclosure of a document which contained complaints made about the applicant would be contrary to the public interest as it would discourage others from coming forward due to concerns that making a complaint would put them "in a lesser light".

A different approach was taken by the Tribunal in *McIntosh v Department of Premier and Cabinet.* The Tribunal weighed the public interest which the Premier and Ministers have in obtaining confidential advice about matters of high policy importance to the interest of the applicant in obtaining the information. Further, the fact that the government's decisions and actions were on the public record, releasing advice given to the Premier and Ministers would breach the confidentiality of the advice and inhibit the capacity of officers to give such advice independently and frankly in the future.

Public Interest Override

The Tribunal must be convinced that the public interest 'demands, or compels, or necessitates' the disclosure of the documents and there is no practical alternative but to release the documents. In *Marke v Office of Public Prosecutions* there was nothing in the applicant's private interest to clear the air which could be elevated to a public interest which necessitated disclosure. FOI Solutions acted in this case.

This position was also adopted by the Tribunal in *Mees v University of Melbourne* where the Tribunal held that the primary purpose behind the applicant's request was to seek preliminary discovery in preparation of issuing legal proceedings against the University, a purely personal interest.

In *Donnellan v City of Casey* the Tribunal placed emphasis on this sense of necessity: the exemption is confined to cases where the wider community's well being '*requires*' it. The Tribunal was of the view that while the media may create a sense of public interest for a particular case, this is not sufficient if in substance the case is not in the public interest. FOI Solutions acted in this case.

Further, the Tribunal held that '*general principles of transparency and accountability*', does not constitute an exceptional matter of overwhelming public interest which may outweigh the exemption established. This view was also adopted in *Asher v Melbourne Water* where it was held mere '*advancement of accountability or transparency'*, is not sufficient ground to apply the public interest override.

Factual and Purely Factual Information

In *McIntosh v Department of Premier and Cabinet* the Tribunal found that in circumstances where the factual material was so embedded in the deliberative content of the documents that it is impractical to release the factual material without revealing the deliberative content, the material is not "*purely*" factual and falls under the ambit of s 30(1).

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RECENT PRIVACY CASES (VIC)

Transfer or Closure of Health Service Provider

In *James v Podiatrists Registration Board of Victoria* the Tribunal found that the applicant failed to take reasonable steps to protect the health information of it's clients from misuse, loss, unauthorized access modification and disclosure, by delivering the documents in an unsecured manner to another organisation, without giving prior notification.

Having established that the applicant failed to publish notice in the newspaper informing patients that their personal records were available for collection, the VCAT considered whether '*any other steps*' were taken. The Tribunal was of the view that it was the applicant's failure to notify the patients '*in any way*' that caused him to be in breach of the *Health Records Act* 2001.

Jurisdiction to hear Referral
The Tribunal in *M and Department of Human Services* commented on whether the Tribunal had jurisdiction to hear only parts of the complaint described to it by the Privacy Commission or the whole complaint.

The Tribunal held that by referring on to the Tribunal the that by referring on to the Tribunal the whole complaint, the Privacy commission had thereby given it jurisdiction to hear the whole matter.

In the recent case of *Carvill v City of Casey*, FOI Solutions was successful in having the application dismissed on behalf of the Council after the Tribunal had heard the applicant's evidence. The Tribunal determined that the application lacked substance as there was no "personal information" complained about. Nothing in the applicant's complaint was about the personal information of the applicant. It was about information which was publicly available.

RECENT CASES (COMMONWEALTH)

Extension of time
The AAT in *David v High Court of Australia* considered the individual circumstances of the applicant in deciding whether or not to grant an extension of time for the applicant to lodge an application for review. The Tribunal found that the applicants circumstances were not proportional to the delay. Further, the Tribunal was of the view that the applicant had '*rested on his rights*' by not taking any action whatsoever to seek applicant for review within the stipulated time period.

Taking into account the merit of the substantive application the Tribunal was of the view that even if the extension was granted no or very few addition documents would be produced, and on this basis denied the extension.

Personal Information
In *Brent v Australian Customs Service* the Tribunal agreed that revealing the personal details of customs personnel and other members of the public, among other concerns might lead to unwanted approaches by other members of the public. A major concern regarding police and customs officers in particular is that not only ordinary members of the public but also criminals might learn of their details and make threatening approaches.

In *Maksimovic v Australian Customs Service* the Tribunal re-iterated that disclosure of information was not personal to the applicant, but rather, was to the world at large under the Commonwealth FOI Act.
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Documents affecting enforcement of the law and protection of public safety
The Tribunal in *Maksimovic v Australian Customs Service* was not concerned with the identification of methods or procedures but rather the disclosing of them, if it would be reasonably likely to prejudice the effectiveness of those methods or procedures. The Tribunal distinguished between those methods already known to the public at large such as interview, fingerprinting, taking of photographs and more sophisticated methods. The Tribunal held that access to those parts of the documents containing information about sophisticated investigation methods would be reasonably likely to prejudice the effectiveness of the methods and procedures.

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:

* Jacqueline Sheppard, Office Manager (June 2009);
* Stephanie Burn , Law Clerk (July 2009).

The additional staff have allowed FOI Solutions to continue to be a pre-eminent provider of legal

Stephanie Burn

Jacqueline Sheppard

Web site

Be sure to try our **NEW DATE CALCULATOR** to assist you calculate when decisions are due, when applicant's rights expire and other relevant dates.

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 Q&A

Q: Should disclosure to an applicant be treated as disclosure to the world at large?
A: In Victoria disclosure is treated as disclosure to the applicant, but potentially to the world at large. In the Commonwealth jurisdiction, however, disclosure is considered disclosure to the world at large.

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

Forthcoming Training

FOI Solutions will be conducting a number of training sessions and lunch time seminars throughout the year. Topics will include:

?? Victorian Charter of Human Rights and Responsibilities Act and the FOI Act.
?? Basic FOI training for FOI decision makers
?? Intermediate FOI training for FOI decision makers
?? Basic Privacy training
?? FOI for health information
?? Sections of the FOI Act not often used or forgotten

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 what you 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 are currently available and the 2009 summaries will be available very soon.

Best of luck with your FOI & Privacy work for 2010!!