

From the Executive Director...

The new FOI Commissioner regime has started and is off to a flurry of activity. Our sources tell us that in about the first 2-3 months the Commissioner has received over 180 requests for review. The FOI Commissioner's office is taking a practical approach and has even welcomed our presence in attending an informal meeting accompanying a client. We would love to hear from you to have a chat about your experiences with the FOI Commissioner—both good and bad—along with any practical tips and lessons learned.

What's News?

RECENT CASES

Environment Victoria Inc v Department of Primary Industries

The applicant sought documents relating to possible mining allocations, reductions to a solar tariff, and changes to planning controls over wind farms.

The Tribunal outlined various considerations relevant to interpreting and applying the Cabinet documents exemption in s 28 of the FOI Act — the exemption covering documents prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.

To determine whether this section applies, the purpose for which a document was prepared must be considered. It was not necessary to prove

the documents were *actually* submitted to a Cabinet or Minister.

The actual use to which the document was put was relevant in determining its purpose, but is not decisive in and of itself.

A document would only be exempt under this exemption if the sole or one of the substantial purposes for preparing it was an exempt purpose under this section.

The Tribunal found that the words 'consideration by Cabinet' suggested consideration as a step in a deliberative process, so that the exemption would not apply to documents circulated to all Ministers forming the Cabinet merely for information purposes.

For this exemption to apply, the document must be prepared *for the purpose of briefing* a minister in relation to issues to be considered by Cabinet. .

A document will have the purpose of briefing a Minister where it contains information or advice and is prepared for the purpose of being read by, or explained to, a minister. If the document is prepared with the intention of physically placing it before the minister without actively involving a briefing, the exemption will not apply.

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Due to the uncertain circumstances of the initial meeting with the Minister, and the fact that the documents were created too early in the process, it was not clear that the documents were prepared for the purpose of briefing the Minister in relation to 'issues to be considered' by Cabinet. Therefore, this exemption was not made out for the relevant documents.

The Tribunal found that both the documents and some of the briefing content could be misconstrued as representing the views of the government, when in fact they showed the views of the Departmental officers to brief the Ministers. Therefore, these documents were exempt under the "internal working documents" exemption in s 30.

The Minister's ability to receive briefing matter of this type confidentially, without being worried as to its release in the public arena, was regarded as more valuable when weighed against various public interest considerations, such as debate on matters of vital public interest and scrutiny of government decision-making.

Note: An application for leave to appeal has been lodged with the Supreme Court of Victoria.

Christodoulou v Department of Justice

The Tribunal decided that it did not have the jurisdiction to oversee proceedings in relation to infringement warrants issued to the applicant, as they were exempt from the operation of the FOI Act, being made under the exercise of judicial functions.

While the applicant argued that the Commonwealth Constitution necessitated the application of the Commonwealth FOI Act, the Tribunal noted that only the Victorian Act applied in this case.

RECENT UPDATES

Victorian FOI Commissioner

Please note that the Victorian FOI Commissioner, Lynne Bertolini, now has a fully operational website:

<http://www.foicommissioner.vic.gov.au/>

Australian Information Commissioner—legislation review

In December 2012, the OAIC made a submission to the Hawke Review regarding the Commonwealth Freedom of Information Act. Some of the recommendations it made include to:

- Amend the IC review provisions to allow the Commissioner greater flexibility to resolve new matters quickly, such as by ADR;
- Streamline time extension provisions and make them less complex to comply with;
- Encourage agencies to establish administrative access schemes;
- Implement the OAIC's 2012 review of charges;

- Introduce a 40-hour processing limit for access requests.

Victorian Privacy Commissioner

In December 2012, the Attorney-General announced reforms to strengthen data security and the protection of personal information in the Victorian public sector, including the introduction of a new Privacy and Data Protection Commissioner in 2013.

The Commissioner will be responsible for oversight of current regimes and a new Victorian Protective Security Policy Framework.

As part of this process, two existing bodies, the Privacy Commissioner and the Commissioner for Law Enforcement Data Security, will form one new entity.

Legislation will be introduced to establish the office in 2013. It is not expected to change any legal obligations under the current regime.

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QUESTION TIME

Q: Is there a number of pages of documents or number of hours in processing that will cause a request for access to be an unreasonable diversion request?

A: No. The test is consciously stated in flexible language to allow for differences in resourcing and impacts between agencies. What may be easy to process for one agency may be a substantial and unreasonable diversion of resources for another agency. It is inappropriate to rely on arbitrary, pre-determined numbers and should be determined in a case by case basis.

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

FIRM NEWS

2012 VCAT Summaries released

Our FOI and Privacy VCAT summaries for 2012 are now available to purchase. They contain summaries of all FOI and Privacy decisions at VCAT from 2012.

New Service

This year, you can also subscribe to receive these summaries monthly, so that you will have summaries of all VCAT decisions in the past month a few weeks after they have been determined. Please contact us for more information or to subscribe to that service.

For more information about these summaries click on the "Publications" button on our website: www.foisolutions.com.au

WEBSITE

Be sure to check our website for information on recent news or developments, 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 as we are about to engage in an update of the 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.

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TRAINING

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

- Basic FOI training for FOI decision makers
- Intermediate FOI training for FOI decision makers
- Consultation and notification

We have now published dates and information about our early 2013 training sessions.

Upcoming sessions include:

- Basic FOI Training (26 March 2013)
- Intermediate FOI Training (26 March 2013)
- Consulting and Notifying Third Parties: Best practice to avoid privacy breaches (19 March and 17 April 2013)

New Topics and sessions are added from time to time so be sure to check our website.

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, whistleblowing or other administrative law matters generally, please do not hesitate to contact Mick Batskos
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Feedback about the newsletter is also welcome.

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 of the 2012 summaries (back issues are also available), log on to our web site and click on the "Publications" button for more information at www.foisolutions.com.au

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