

From the Executive Director...

By Mick Batskos

Many of our clients regularly purchase our annual VCAT case summaries for all FOI and Privacy decisions in Victoria. We have been providing that service since 2004 (see "Announcements and Recent Developments" on our web site at: www.foisolutions.com.au). We are presently exploring the possibility of introducing a subscription service which will mean that clients can obtain summaries of relevant FOI and Privacy cases within days or weeks of decisions being handed down, rather than at the end of the year.

If you or your organisation would be interested in receiving more information about this possible service or in subscribing to such a service please send an email to us at paige@foisolutions.com.au setting out your name, position, organisation and contact details. If sufficient interest is expressed, it is expected that service may commence in 2013. We look forward to hearing from you.

What's News?

RECENT CASES

The Age v CenITex (VCAT Unreported, 18 September 2012)

The Tribunal accepted that 2 requests would substantially and unreasonably divert the resources of CenITex if processed. It accepted the submission that the only method of complying with the request would be to have all emails retrieved and examined to ascertain whether they contained relevant information.

Although the applicant sought to qualify her request at the hearing, the Tribunal noted that was not how the request was framed and that the respondent could not be expected to unilaterally narrow the request in the manner now suggested by the

applicant, stressing that was what the consultation process was for.

Under s 25A(b) VCAT found that the request was very broad and processing would require going through in excess of 1 million emails that would need to be retrieved from an external source. Further it noted that although it was possible that some of the time to be spent processing was overestimated, it may also have been underestimated and in these circumstances the estimation was not excessive. FOI Solutions acted for CenITex.

AB v Department of Education [2012] VCAT 1233

The Tribunal accepted that the request would cause the Department's resources to be substantially diverted due to the "extraordinary complexity" of the request and the lack of resources available. Such a diversion was found to be unreasonable in the circumstances. Emphasis was placed on the fact that the request was difficult to process because of its many individual specifications, it was not reasonably manageable, and the public interest had been satisfied through the Department's processing of a previous request.

Notably the Tribunal commended the Department for its efforts to meet the statutory time

Contents	
Recent Cases	1-2
Recent Updates	2
Question Time	3
Firm news	3
Website	3
Training	4
Further Information	4

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limit. It commented that there were many instances across government where the 45 day time limits were not met and discouraged applicant's from placing excessive emphasis on this requirement.



Smeaton v Victorian WorkCover Authority [2012] VCAT 1234

The applicant sought review following WorkCover's claim that the documents sought did

not exist.

The Tribunal reiterated that VCAT had jurisdiction to order that the respondent undertake further searches where "there was a clear and reasonable basis for believing other documents existed". It was stated that for the applicant to succeed he would have to do more than speculate that the documents existed, even a "skilled and detailed speculation" of the contents of the archive system was insufficient.

It was held that correspondence stating WorkCover's compliance with the *Public Records Act* did not have bearing on the Tribunal's decision. The respondent's decision was substantially affirmed.

RECENT UPDATES

"Build Privacy in at the beginning"

The office of the Australian Information Commissioner has found Telstra breached NPP 2.1 and 4.1 in December 2011 when some of its customer details were made available online. The information included names, phone numbers and in some cases drivers license details and credit card numbers. Australian Privacy Commissioner, Timothy Pilgrim advised "Build your privacy in at the beginning, don't bolt it on as an afterthought. All businesses should conduct a PIA [privacy impact assessment] to make sure that potential privacy risks are considered at the start of any project and that risk mitigation strategies are put in place".

Excessive Access charges

The recent decision of the Australian Information Commissioner in *McBeth and Australian Agency for International Development* [2012] AICmr 24 noted that a charge "must not be used to discourage an applicant from exercising a right of access conferred by the FOI Act". It should "fairly reflect the work involved in providing access to documents on request".

In this instance the complexity and sensitivity of the information contained in the documents and the consultations required led the commissioner to conclude that charges were correctly assessed.

The applicant also sought review of the decision not to reduce charges on the basis that the giving of access was in the public interest. The commissioner found as the documents were to be used in research that was to be published widely it was appropriate to reduce the charge applicable by 50%.

"Open Government reforms create more transparency"

The office of the Australian Information Commissioner has released a paper confirming that agencies are moving closer towards an open access and proactive disclosure culture. Findings included that 85% of agencies publish required IPS information on their website and 94% publish information showing how decisions affecting the public are made.

The Commissioner identified specific areas for improvement including, making information more discoverable and ensuring that online information is accessible to the community, including people with disabilities.

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QUESTION TIME

Q: We have received a very broad request that would take substantial resources to process, what are our obligations under the act to consult with an applicant to assist them to make a valid request?

A: The breadth of the request does not affect its validity. If you know what documents you are looking for, the fact that the category of documents is broad is generally irrelevant in determining validity. Assuming that the request is valid, you must consider whether the request is such that processing it would substantially and unreasonably divert from their other operations those resources reasonably required to process the request, consistent with attendance to other priorities. If so, you cannot refuse to process without first consulting the applicant by sending a notice under s 25A(6) (Vic)/s 24AB (Cth).

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

Many of you are aware that in recent years Mick Batskos has established our partner organisation, FOI Support, to provide administrative assistance to agencies. FOI Support is able to make available experienced and reliable individuals to assist your agency to deal with FOI related issues at non-lawyer's rates. This can include assisting with:

- Clearing backlogs;
- Filling a staff shortage;
- Dealing with unexpected increases in requests;
- Filling in statistical returns;
- Preparing your Part II statement

For more information go to our web site at: www.foisolutions.com.au/FOISupport.htm

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.

- Basic FOI training for FOI decision makers
- Intermediate FOI training for FOI decision makers
- FOI for health information
- Training on amendments to FOI legislation

FOI Solutions has recently expanded its training topics to include new topics for the first time in 2012:

- (a) Electronic documents (what are they; what form of access must be provided; what access charges apply); and
- (b) Consulting and notifying 3rd parties (i.e. under ss 33 and 34(1); avoiding privacy breaches)

These sessions are proving to be very popular.

Details of our training timetable for 2012 and registration forms are available on our web site: www.foisolutions.com.au under the "Training" option. Come back often as we add new sessions from time to time.

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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Your feedback about the Newsletter would be most welcome, including possible topics 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 at www.foisolutions.com.au

The 2011 VCAT case summaries are now available.

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