

From the Executive Director...

This year there have been an unusually large number of VCAT decisions concerning an agency's decision to refuse access on the basis of unreasonable diversion of resources. In each instance the Tribunal has affirmed the agency's decision. Two of those cases are summarised below. FOI Solutions may hold training on this in early 2013. Check our website regularly for updated information.

The new Victorian FOI Commissioner regime has come into force. Ensure that statements of reasons for decision are thorough, comprehensive and comply with the requirements of s 27. They will be the first thing the FOI Commissioner sees.

FOI Solutions has qualified for inclusion on the Commonwealth Legal Services Multi-Use List, enabling it to continue to provide legal services to Commonwealth Government Departments, agencies and statutory authorities.

What's News?

RECENT CASES

Smeaton v Victorian WorkCover Authority [2012] VCAT 1550

The Tribunal found that the agency was not seeking an excuse for refusing to process, but rather on a balanced consideration found the resources available at the time the request was lodged were insufficient to process.

The estimated 90 hours to process were viewed as being at the lower end of what would be considered an unreasonable diversion decision. In affirming the agency's decision the Tribunal considered:

- The public interest;
- That the request was not reasonably manageable, rather the applicant was on "a fishing expedition"

- The substantial resources allocated over the years dealing with multiple requests from the applicant.

Smeaton v Victorian WorkCover Authority [2012] VCAT 1551

Here, the Tribunal referred to the VCAT 1150 Smeaton decision, stating that it need not repeat its analysis finding that the request would substantially and unreasonably divert the respondent's resources. In reaching its decision it held that:

- The respondent had undertaken the mandatory consultation process;
- The task was enormous having been estimated to take a minimum of 1200 hours and was at the high end of the scale;
- The resources available to the respondent were subcontractors and it was not certain if they would do the job if asked.

Luck v Victoria Police [2012] VCAT 1617

The decision concerned an initial request that the applicant declined to consult on. In her letter refusing s 17 consultation, the applicant purported to make a further request.

It was found the words "in addition, I make a formal request..." combined with an application for waiver of the application fee were

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sufficient to create a new and separate request further to the original request. The decision largely concerned jurisdiction, it was found that:

- If a document should be available to the public under s 7 or 8 but was not in fact available; it could be the subject of a valid request;

For a request to be valid, it must contain sufficient information to enable identification of the document, merely showing a request is broad is not sufficient to show that it lacks certain definition. As the request sought to repeat a statutory duty to make certain documents available, it was difficult to see how it could be regarded as other than comprehensible.

The Tribunal accepted that each separate screen in a computer system should be regarded as a separate document.

Where the material requested was not available in discrete form, the agency was required to deal with the request as if it were a request for access to a written document containing the relevant information under s 19. The right to request a document in a specific form under s 23(1) was overridden by the effect of s 19.

Reaper v QBE Workers Compensation (Health and Privacy) [2012] VCAT 1514

In the context of a complaint with the Health Services Commissioner under the Health Records Act, the Tribunal explained that 'primary purpose' in that Act involved an objective test. All the circumstances of collection were relevant.

RECENT UPDATES

Victorian Freedom of Information Commissioner announced

The Victorian Government appointed Lynne Bertolini as its first FOI Commissioner. She was previously Director of Licensing approvals at the Victorian Commission for Gambling and Liquor Regulation. The new FOI Commissioner will be responsible for reviews of initial decisions as well as accepting complaints about FOI processing by agencies.

The new FOI regime implemented by the *Freedom of Information Amendment (Freedom of Information Commissioner) Act 2012* including the Commissioner's functions and powers, was fully in operation by 1 December 2012.

The new FOI Commissioner now has an operative web site at www.foicomimssioner.vic.gov.au containing details about her functions (reviews, complaints and education) as well as links to relevant legislation.

When describing review rights in your decision letters, please note the FOI Commissioner's contact details:

Email: info@foisolutions.com.au
Ph: 9601 4111
www.foisolutions.com.au

Ms Lynne Bertolini
FOI Commissioner
PO BOX 24274
Melbourne, VIC 3001
Tel: 1300 842 364
Email: enquiries@foicommissioner.vic.gov.au
Web: foicommissioner.vic.gov.au

Please contact us if you need assistance in reviewing and amending your processes and procedures to reflect the new regime.

Victorian Privacy Commissioner Annual Report

The 2011-2012 Report noted a record number of enquiries and complaints to the Commissioner.

It was also very concerned about the lack of attention to privacy in the implementation of planning and major projects. The Commissioner stressed that early, thorough and independent Privacy Impact Assessments were very important.

Another interesting issue canvassed in the report was the increasing use of portable storage devices. The Office conducted a survey in 2011 which showed a lack of improvement in securing such devices by a large number of organisations.

QUESTION TIME

Q: What are the contact details for the new Victorian FOI Commissioner?

A:

Ms Lynne Bertolini
FOI Commissioner
PO BOX 24274
Melbourne, VIC 3001
Tel: 1300 842 364
Email: enquiries@foicommissioner.vic.gov.au
Web: foicommissioner.vic.gov.au

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

New staff member

Julia De Marchi joined the FOI Solutions team in November 2012 as an administration officer. She provides administrative and reception services. She can be contacted at reception on 9601 4111 or at julia@foisolutions.com.au.

2012 VCAT Summaries to be released

Keep an eye on our website in December for information regarding the annual release of our FOI and Privacy VCAT summaries. These will be available to purchase and contain summaries of all FOI and Privacy decisions at VCAT. The 2012 edition will be released early in January 2013.

New Service

Next year, you will also be able to 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 express an interest in subscribing to that service.

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.

Email: info@foisolutions.com.au
Ph: 9601 4111
www.foisolutions.com.au

TRAINING

FOI Solutions conducted 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
- Consultation and notification
- Electronic records and access charges

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.

We will be publishing dates and information about our 2013 training sessions on our website early in January 2013.

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
Tel: 9601 4111
Mobile: 0417 100 796 Fax: 9601 4101
Email: mick@foisolutions.com.au

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 2011 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

We would like to wish all of our clients a Merry Christmas and Happy New Year. We look forward to working with you again in 2013.



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