

From the Executive Director...

ATTENTION ALL VICTORIAN Government Agencies. FOI Solutions has become aware of a practice by the Victorian FOI Commissioner when conducting reviews which may affect claims for exemption. This involves providing to the FOI Commissioner a set of the exempt documents when that might not be required. Under the guise of the obligation on agencies to assist the FOI Commissioner to undertake a review, agencies are being asked to provide the exempt documents. However s 63C of the FOI Act sets out when you must do so. If you provide them when not required that may adversely impact on your exemption claims. Please contact us if you need assistance with this issue.

MICK BATSKOS



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Recent Cases

Duzdevich v Department of Human Services

The applicant requested a copy of her tenancy file from the Department of Human Services (“**Department**”). The Department exempted certain documents from disclosure. The applicant argued that the Department had not acted appropriately in its dealings with her, and was refusing access to the documents to protect itself and cover its own shortcomings.

The documents included emails between the Department’s Legal Services Branch and Departmental Housing Officers, a file note of a discussion between a Department officer and an officer of a law enforcement agency about various persons, and unsolicited handwritten letters to the Department.

s 30—internal working documents exemption

A number of documents were exempt as disclosure would be likely to undermine the Department’s right to obtain legal advice on a privileged basis in the future. Additionally, the Tribunal noted that disclosure could lead to an escalation of disputes and hinder the effective resolution of disputes which was contrary to the public interest.

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Recent Cases continued...

s 32—legal professional privilege exemption

The emails were exempt under legal professional privilege as they provided legal advice to the Housing Officers, were made for this dominant purpose and contained confidential communications between solicitor and client.

s 33—personal affairs information exemption

Certain documents were exempt under the personal affairs information exemption as disclosure would identify various individuals and their opinions, and would be unreasonable in all the circumstances given the nature of the information involved and the context in which documents were generated.

s 35—communicated in confidence exemption

Some documents were exempt because they were communicated in confidence, and disclosure would be reasonably likely to impair the Department's ability to obtain similar information in the future. Furthermore, there was a real risk of recriminations against people who made statements to the Department in related matters, and accordingly there was a real need for the Department to assure these people of their anonymity and ensure it was not compromised.

s 50(4) - the public interest override

There was no public interest in favour of disclosing the documents. The Tribunal acknowledged that the appli-

cant did have *private* interests in accessing the documents, but this was not enough to override the exemption.

The Department's decision was affirmed.

Hennessy v Department of Justice

The applicant sought access to briefings and memos relating to a review of CCTV systems in Victorian correctional facilities. The Department of Justice ("Department") did not respond to the applicant's request within the required time frame, and the applicant sought VCAT review of the Department's deemed refusal of the request. The Department later notified the applicant that it had located a set of documents. The applicant believed that more documents existed and that the Department had not engaged in a thorough and diligent search for any remaining documents.

The Tribunal found that there was a reasonable basis for the applicant's belief that further documents existed, backed up by documentary evidence and the circumstances of the investigation conducted (including that it was a major review requiring significant activity at a senior level).

Additionally, the Department had not conducted a thorough and diligent search for all documents relevant to the applicant's request. For example, it had only searched for "CCTV" on its electronic database, but should have also searched for synonymous terms such as "closed circuit television".

The Tribunal therefore directed the Department to undertake further searches to locate all documents relevant to the applicant's request.

Recent Updates

In August 2013, the Commonwealth Attorney-General's Office released the Hawke Review regarding the Commonwealth *Freedom of Information Act* and the *Australian Information Commissioner Act*. Some of the conclusions reached were:

- That the requirement for agencies to publish information proactively has been realised through introduction of the Information Publication Scheme and agency disclosure logs; and
- That the federal FOI regime has promoted transparency across government and the public sector, facilitating the release of information that may otherwise not have been released; and
- That the removal of application fees for FOI requests saw significant increases in the use of the FOI regime by many people and groups, promoting representative democracy and increasing public participation in government process; and

- That Australian government agencies must establish organisational cultures in which their staff feel comfortable in releasing government information as a matter of course.

The Review also contained a number of recommendations for reform, some of which were:

- For the Office of the Australian Information Commissioner to establish an online system enabling agencies and applicants involved in specific FOI reviews or FOI complaint investigations to monitor the progress of the review or complaint; and
- That the FOI Act be amended to provide an express power for the Information Commissioner to remit a matter for further consideration by the original decision-maker.

The Hawke Review is available in full at <http://www.ag.gov.au/Consultations/Pages/ReviewofFOI.aspx>

Question time

Q: If I decided to refuse access on the basis that processing the request would substantially and unreasonably divert our resources, what could the Victorian FOI Commissioner do on review?

A: The FOI Commissioner could seek a detailed explanation as to how you came to form that view and might ask to be provided with supporting documents or other information. You must assist the FOI Commissioner to undertake the review. However, the FOI Commissioner does not have the power to:

(a) produce all the documents sought (as that would defeat the purpose of s 25A(1) of the FOI Act);

(b) require you to process the request;

(c) remit the matter to your agency to process and make a decision; or

(d) seek to negotiate that you process an amended (narrower) request without the applicant submitting a fresh request.

On review it would appear that usually the FOI Commissioner will need to either:

(a) make the same decision; or

(b) dismiss the application on the basis that it is more appropriately dealt with by the VCAT (which has power to require the request to be processed).

Firm News

15 Year Anniversary

FOI Solutions celebrated its 15 Year Anniversary this year on 7 August. We were pleased to be able to share the experience of this momentous occasion with many clients, colleagues, family members and friends. We also celebrated 30 years of FOI being operational in Victoria and were privileged to have former Victorian Premier and the father of the Victorian FOI Act, the Honourable John Cain, at the celebration to deliver an address about the development of the Victorian FOI landscape since its inception in 1982.

2012 VCAT Summaries released

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

New Service

You can also subscribe to receive VCAT FOI and Privacy summaries monthly, so that you will have summaries of all VCAT decisions in the previous month a few weeks after they have been determined. Please contact us for more information or to subscribe to that service or go to our web site: www.foisolutions.com.au/publications.php. Be sure to keep up with decision making trends. If you subscribe for 12 or 24 months you also get the annual summary for that year free of charge.



Above: Mick Batskos and special guest the Hon. John Cain

Below: The FOI Solutions team (back row from left) Elisa, Paige, Joshua, Sarah, Peter (front row from left) Shiloh, Mick, Jackie, Emma, Amy
Absent: Mel



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.



Professional excellence in government law

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 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

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
- Third Party Consultation and Notification
- Protected Disclosures

NEW SESSIONS for 2013

- Social Media and FOI
- Victorian Councils
- Drafting Decisions

We will be holding a number of training sessions throughout the rest of 2013. Please check our website for details of these training sessions.

If you have a particular topic you would like covered in a future training session or lunchtime update, please contact our Executive Director:

mick@foisolutions.com.au.

Upcoming sessions

8 October 2013

Social Media and FOI

15 October 2013

Basic FOI Training
Intermediate FOI Training

21 October 2013

Councils

28 October 2013

Councils

29 October 2013

Social Media and FOI

13 November 2013

Drafting Decisions

29 November 2013

Drafting Decisions

New topics and sessions are added from time to time, so be sure to check our website regularly.