



## IMPORTANT UPDATE

### Supreme Court Rules of secrecy exemption

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**The Supreme Court today ruled that the VCAT had made an error of law in its interpretation and application of s 38 of the Victorian FOI Act. That provision relates to when a secrecy provision in another enactment will be recognised and given effect by the FOI Act. FOI Solutions acted for the Secretary to the Department of Justice in this successful appeal.**

The Court affirmed that before s 38 applied 3 conditions were to be satisfied:

1. there must be an enactment in force;
2. it must apply specifically to the information of a kind contained in the document in question;
3. the enactment must prohibit persons referred to in the enactment from disclosing information of that kind (either absolutely or subject to exceptions or qualifications).

This meant that the Tribunal was wrong in concluding that the enactment must prohibit *the person in possession of the document* (or a person to whom it was addressed or provided) from disclosing the information in the document. Therefore a document would be exempt if the secrecy provision applies to the *contents of the document* rather than it depending on the more random basis of whether or not the document falls into the hands of any individual who may or may not be a person which the secrecy provision prohibits from disclosing the information.

In this case the Tribunal asked itself whether the Secretary was one of the persons to whom the secrecy provision applied. That was the wrong question. It only had to consider whether the secrecy provision prohibited persons referred to in that provision from disclosing the information and whether or not the Secretary was one of those persons was not relevant.

The Court also stated that whilst the Court (and we suggest any agency or the Tribunal) should strive to interpret the FOI Act in a manner harmonious with its objectives, it should do so only to the fullest extent that the text of the FOI Act actually allows.

If you require any assistance or advice in applying this decision to any particular fact situation or you have any queries about the decision, please do not hesitate to contact us.

**Dated: 3 March 2009**

A handwritten signature in black ink that reads 'Mick Batskos'.

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