

## FOI in practice

Edition 2

### **Johnson v Cancer Council of Victoria [2016] VCAT 1596**

This significant matter involved an application to VCAT to review a decision by the FOI Commissioner to refuse access to six documents. Those documents related to four surveys concerning attitudes to, and the consumption of, tobacco, conducted by a research centre at the Cancer Council of Victoria (CCV) and connected to the implementation of plain packaging legislation. The application was brought in the interests of British American Tobacco.

Before considering the six documents, the decision of the President, Garde J, dealt with the applicant's argument that as the FOI exemptions only apply to statutory authorities, CCV lost its right to the exemptions when it changed in 2015 from a statutory authority to a company limited by guarantee. The President found that the exemptions were existing rights that were not affected when CCV changed its corporate structure (at paras 31-6).

In relation to the documents, five of them (including 'document 1', the ASSAD Survey<sup>1</sup> which surveyed Australian high school children about their attitudes to tobacco and illicit drugs) comprised 'working datasets'. Those five were held not to be finalised documents. 'Document 2' (the National Monthly Tracking Survey of Smokers and Recent Quitters), however, was held to be complete and the final dataset had been released. Therefore, although VCAT affirmed the FOI Commissioner's decision to exempt the five un-finalised documents, it also ordered that document 2 be released as the public interest limb in s 30(1) - that it would be contrary to the public interest to release - could not be satisfied.

In relation to the five un-finalised documents, VCAT considered the following three exemptions under the FOI Act:

#### **1. The Internal Working Documents Exemption (s 30(1))**

In relation to the first limb of s 30(1), it was held that the material was in the nature of consultation or deliberation between officers in the course of the deliberative processes involved in the functions of CCV. This was because the various surveys contained questions selected and formulated by officers of CCV, and the development and use of the datasets require creativity, skill and experience in scientific and statistical learning and expertise, including analysis, and these processes and functions constitute 'deliberation' on the part of CCV (at paras 226-231). Also, it was held that the documents contained information which was much more than 'purely factual material.'

In relation to the second limb of s 30(1), VCAT emphasised that the public interest depends on the circumstances of the individual case, which included here that drafts and internal working documents are ordinarily superseded by final texts, and that by their nature the documents were likely to contain errors, and it was therefore reasonable to deny access.

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<sup>1</sup> Australian Secondary Student Alcohol and Drug Survey, from 2011 and 2013.

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Further, his Honour drew on the public interest here as being informed by s 34(4)(b)(iii), by way of analogy (see below). In this matter, there was significant public and commercial interest in accessing studies analysing the effects of plain packaging laws. However, disclosing a document comprising partly completed scientific or technical research would likely jeopardise the integrity and future development of CCV's research on an issue of public health. Further, it would be unfair to CCV researchers if other persons could take advantage of their work in order to lead publications in this area (at paras 240-3).

Conversely, VCAT noted that, when the research is completed, the balance of public interest swings in favour of disclosure.

## **2. The Incomplete Research Exemption (s 34(4)(b)(iii))**

VCAT also held that the five un-finalised datasets were exempt from release under s 34(4)(b)(iii) as they contained the results of technical research undertaken by CCV researchers and officers and that the disclosure of results before the completion of the research would be reasonably likely to expose CCV unreasonably to disadvantage (at paras 273-4). In summary, such release would disadvantage the researchers by allowing others to analyse and make use of the data before the researchers had an opportunity to complete their analyses. Further, there may be unfair or unreasonable criticism of the research if subjected to public scrutiny before proper peer review. Such release also raised the risk of unethical use of the data and the potential for misuse of the information.

## **3. The Information Communicated in Confidence Exemption (s 35(1)(b))**

VCAT held that the exemption in s 35(1)(b) applied to the ASSAD Survey because firstly, it was information communicated in confidence by the students to researchers conducting the survey, and that schools similarly were informed that the information collected would be treated in 'strict confidence'.

Secondly, in relation to the public interest component of s 35(1)(b), disclosure of the document would be contrary to the public interest because it would be likely to impair the ability of an agency to obtain similar information in the future. CCV only obtained ethical approval for its research, and consent from its participants, because it had guaranteed that participant information would remain confidential. The participants were children and the working datasets contained potentially identifying information including their age, gender and the postcode of their school. As CCV would be unlikely to receive ethical approval in the future if it disclosed the confidential information, VCAT held that its disclosure would be contrary to the public interest as it would likely impair the ability of CCV to obtain similar information in future (at paras 296-8).

### **Potential deletion of exempt information**

The applicant's final argument was that the exempt information could be deleted from the datasets under s 25 and a copy containing non-exempt information could be disclosed. VCAT held it was not practicable to this, because the factual information could not be separated from the opinions of the researchers (at paras 312, 314).

The reasons for the decision can be found at:

<http://www.austlii.edu.au/au/cases/vic/VCAT/2016/1596.html>

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