

FOI in practice

Edition 3

Hon Tim Smith v Hon Daniel Andrews MP (Premier) [2017] VCAT 340 (10 March 2017)

In this application to VCAT, the applicant was seeking review of a decision by the respondent to refuse access to screen shots of web browser histories of each person employed in or seconded to the Office of the Premier (OTP). VCAT affirmed the decision of the respondent not to grant the FOI request.

Rather than relating to the more usual issues of exemptions, this case concerned the threshold question as to the right to obtain access to 'an official document of a Minister' under s 13(b) of the FOI Act, and specifically whether or not a web browser history of a ministerial officer in the OTP is an 'official document of a Minister'. This question became the focus of the matter, because the parties had agreed that: (1) a web browser history could be a 'document' under s 5 of the Act; and (2) the OTP is not an agency under the Act.

In answering this question, VCAT first examined the characteristics of web browser histories, and stated (at [52]) that:

They are a 'by-product automatically generated by underlying software';

No deliberate or intentional act of the user is required for a web browser history to be generated or saved;

It is merely a list and an unreliable record;

Users can clear their history at any time and can override the default retention setting;

It does not record the information accessed by the user, nor is it a record of information or documents downloaded; and

There is no obligation on staff of OTP to retain their web browser histories, and they are not used for any organisational purpose.

VCAT having noted that an 'official document of a minister' is defined in s 5 to be a document which 'relates to the affairs on an agency', VCAT then referred to *Office of the Premier v The Herald and Weekly Times Pty Ltd* (2013) 38 VR 684, and stated (at [59]-[60]) that:

“the affairs of an agency’ is restricted to the business, activities and responsibilities of, and arrangements made with and by, an agency”, and does not extend to anything that could be considered the business of government or the exercise by a Minister of his or her Ministerial functions. In particular, it does not extend to everything a ministerial officer in the Office of the Premier might do in the course of a day.”

Accordingly, VCAT found (at [74]) that based on its general character and content that a web browser history of a ministerial officer in the OTP bears no direct or indirect relationship to the affairs of an agency. In summary (at [75]), while a web browser history might relate indirectly to the activities of a ministerial officer in the course of a day in the OTP, as a document it does not relate, directly or indirectly to: the business and activities of an agency; the agency’s area of governmental responsibility; or arrangements between areas of government departments or other agencies and external entities, including arrangements between agencies and ministerial advisers from the OTP.

The reasons for the decision can be found at:

<http://www.austlii.edu.au/au/cases/vic/VCAT/2017/340.html>

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