

FOI in practice

Edition 4

Recent VCAT Orders at a Jurisdictional Hearing

Background

On 20 March 2017, the Victorian Civil and Administrative Tribunal (VCAT) made some orders that may be of interest to FOI practitioners.

Those orders were made in *George Cochrane v Melbourne Polytechnic* (Z25/2017). In his application for review, Mr Cochrane sought review – under section 50(1)(b) of the FOI Act – of two decisions taken to have been made by the Freedom of Information Commissioner under section 49J(2) of that Act.

The Agency took the position that Mr Cochrane’s application for review was both invalid and out of time.

The FOI Commissioner was concerned about the potential implications for future review matters, and therefore applied to assist VCAT at the hearing. VCAT heard submissions from the Applicant, the Agency and the FOI Commissioner.

What were the grounds raised by the Agency at the hearing?

- That the application for review was invalid because it sought review of two separate FOI decisions, rather than one.
- That the application for review was out of time because it was lodged after the 60 day period set out in section 52(5) of the FOI Act.

What was the position of the FOI Commissioner at the hearing?

- That the application for review was not invalid because it sought review of two separate decisions. Rather, the need for the application to seek review of one decision only was a procedural requirement that the VCAT could – and should – waive under section 126(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).
- That the application for review was not out of time because the 60 day period (set out in section 52(5) of the FOI Act) does not apply to a review of a decision taken to have been made by the FOI Commissioner under section 49J(2) of that Act.

What did VCAT do?

- VCAT found that the application for review was valid, even though it sought review of two decisions rather than one. It regarded the need to seek review of one decision only as a procedural requirement, and it exercised its discretion to waive that requirement under section 126(2)(b) of the VCAT Act.
- VCAT declined to make a ruling on whether the 60 day period set out in section 52(5) of the FOI Act applies to an application for review of a decision taken to have been made by the FOI Commissioner under section 49J(2) of that Act. Instead, it made an order – under section 126(1) of the VCAT Act – extending the time for commencing the proceeding if such an extension were necessary.

What are the practical implications for Agencies of VCAT’s rulings?

- If an applicant includes more than one FOI decision in a review application to VCAT, there is no basis for claiming that the application is invalid. Instead, such an application is procedurally irregular, and VCAT may exercise its discretion to waive the procedural requirement to seek review of one decision only.
- It is well established that the 60 day period set out in section 52 of the FOI Act does not apply where an applicant applies to VCAT for review of an agency’s deemed refusal under section 53(1) of the FOI Act. See, eg, *Borthwick v University of Melbourne* (1985) 1 VAR 33 at 36-37; *O’Brien v Department of Justice* [2010] VCAT 1379 at [25], [30].
- By contrast, VCAT has yet to decide whether that 60 day period applies when an applicant applies to VCAT for review of a decision taken to have been made by the FOI Commissioner under section 49J(2) of the FOI Act. In that situation, VCAT may choose – as it did in Mr Cochrane’s case – to grant an extension of time without deciding whether such an extension is necessary.

The “FOI in practice” series of resources is designed to provide Victorian government agency officers with information and guidance on applying the provisions of the FOI Act. This resource does not constitute legal advice and should not be used as a substitute for applying the provisions of the Freedom of Information Act 1982, or any other legal requirement, to individual cases.