

FOI in practice

Edition 5

O'Brien v Jennings [2017] VCAT 1395 (31 August 2017)

On 31 August 2017, the Victorian Civil and Administrative Tribunal (**the Tribunal**) handed down a decision concerning its power, when reviewing a decision to refuse access to documents made on behalf of a Minister, to deal with a complaint that an agency has not undertaken an adequate search for documents.

Decision

The Tribunal determined that it has no power under s 50(1) of the *Freedom of Information Act 1982* (**FOI Act**) to consider whether an agency or a Minister has undertaken an adequate search for documents.

Facts

The applicant made an application to a Minister for access to documents under the FOI Act.

A decision was not made within the statutory timeframe.

The applicant initially applied to the Tribunal for review of a 'deemed refusal'. An agency officer, who was authorised by the Minister to determine the request on his behalf, subsequently made a decision refusing access to documents.

Orders later made by the Tribunal, at the applicant's request, substituted the agency's actual decision for the deemed decision.

As a part of the Tribunal's review of the agency's actual decision, the applicant sought to have the Tribunal deal with a concern that further relevant documents existed, but had not been identified by the agency (or the Minister).

A preliminary hearing was conducted to determine whether the Tribunal has jurisdiction under s 50(1) of the FOI Act to entertain a complaint that a thorough and diligent search has not been conducted by a decision maker as part of the Tribunal's review jurisdiction.

Reasons

In its reasons, the Tribunal considered previous relevant decisions¹ and stated –

- the FOI Act is silent on the jurisdiction of the Tribunal to go behind an agency or Minister's decision to consider whether a thorough and diligent search for documents has been conducted;

¹ *Smeaton v Victorian Workcover Authority* [2010] VCAT 1264; *Smeaton v Transport Accident Commission* [2014] 341 and *Victoria Police v Burton* [1999] VSC 534

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- the Tribunal’s jurisdiction to order an agency to conduct a further search for documents ceased with the establishment of the (former) office of the Freedom of Information Commissioner following amendments to the FOI Act in 2012; and
 - the scheme established by the 2012 amendments, in particular, the inclusion of a complaints mechanism under s 61A(1), means that the power to investigate complaints rests solely with the (former) Freedom of Information Commissioner and not the Tribunal.

Further amendments to the FOI Act

Since this decision was handed down, further amendments to the FOI Act came into effect on 1 September 2017.

The amendments abolish the office of the Freedom of Information Commissioner and provide for the appointment of an Information Commissioner under s 6C and the establishment of the Office of the Victorian Information Commissioner under s 6B to support the Information Commissioner. Section 61A(1) has also been amended by the insertion of s 61A(1)(ba), which provides that the Information Commissioner can investigate a decision by a Minister that a document does not exist or cannot be located.

This means that the Information Commissioner now has jurisdiction under the FOI Act to investigate a complaint about the adequacy of a document search conducted by or on behalf of either an agency or a Minister.

What does the decision mean for applicants and FOI decision makers?

An applicant, who considers that an agency or Minister has not conducted a thorough and diligent search in circumstances where they receive a decision that a document does not exist or cannot be located, has a right to make a complaint to the Information Commissioner under ss 61A(1)(a) (in relation to an agency) or 61A(1)(ba) (in relation to a Minister) of the FOI Act.

If the Tribunal reviews a decision refusing an applicant access to documents, the Tribunal’s jurisdiction under s 50(1) of the FOI Act does not extend to it also dealing with concerns that a thorough or diligent search has not been undertaken by the relevant agency or a Minister. As stated above, the FOI Act provides for the applicant to make a complaint to the Information Commissioner under s 61A(1).

However, where an agency or Minister has not yet made a decision and the applicant has applied to the Tribunal for review of a ‘deemed refusal’, it appears that the Tribunal has jurisdiction to make orders in relation the adequacy of searches undertaken by the agency or Minister.²

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.

² *Tabcorp Holdings Ltd v The Secretary to the Department of Treasury and Finance (No 1)* [2013] VCAT 1234 (per Jenkins J, Vice President)