

# FREEDOM OF INFORMATION (AMENDMENT) ACT 1999

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## INTRODUCTION

As many of you would be aware, the Victorian Government has amended the *Freedom of Information Act* 1982 (“**FOI Act**”) by introducing a prohibition on government agencies from releasing personal information. In this paper I propose to outline briefly:

- the background to the amendments;
- the nature of the amendments; and
- what the amendments will mean for agencies.

## BACKGROUND TO THE AMENDMENTS

The *Freedom of Information (Amendment) Act* 1999 (“**Amendment Act**”) was assented to on 8 June 1999. It will come into effect from 1 July 1999.

The Amendment Act has arisen as a direct result of the much-publicised Frankston Hospital case. In January 1999 that decision came to light. It involved the granting of access to the nursing rosters about a particular ward at the Hospital. The rosters apparently contained the names of 51 nurses who may have been on duty at a particular date. The rosters were sought by a convicted triple murderer, Ashley Mervyn Coulston, in an attempt to support an alibi that he was visiting his partner at the hospital at the time the murders were supposed to have taken place.

The Victorian Civil and Administrative Tribunal (“**VCAT**”) held that the names of the nurses on the rosters did not relate to their personal affairs under section 33 of the FOI Act. It was the only exemption raised by the doctor who represented the hospital at the hearing. As you will recall, that provision exempts from access documents the disclosure of which would result in the unreasonable disclosure of information relating to the personal affairs of a person (other than the applicant). The Hospital did not appeal the decision and the documents were released.

When the matter came to light in January 1999 the Government conducted a review of that part of the FOI Act dealing with information relating to the personal affairs of persons. Mr Kennett wished to ensure that such a situation did not arise again. The review took a number of months and has now resulted in the Amendment Act.

## OUTLINE OF AMENDMENT ACT

The Act introduces a new Part into the FOI Act, Part IIIA entitled, “Documents Containing Personal Information”. It defines “personal information” to mean:

“*information*

- (a) *that identifies any person or discloses their address or location; or*
- (b) *from which any person’s identity, address or location can reasonably be determined”.*

Unless an order is made by the VCAT, an agency is prohibited from giving access to a document that contains personal information about a person (other than the applicant) except:



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- (a) personal information that the applicant already knows or ought to know; or
- (b) personal information that the applicant could reasonably obtain (other than as a result of a request under the FOI Act) from documents generally available to the public for inspection or purchase.

An agency can also release an edited copy of the document (which is not otherwise exempt) with the personal information deleted provided it is:

- (a) practicable for the agency to do so; and
- (b) it appears from the request or the applicant subsequently indicates that the applicant wishes to have access to such a copy. For example, some applicants often state that they are not interested in knowing the names of individuals referred to in documents sought.

If full or partial access is refused on the basis that the document contains personal information, the agency must inform the applicant of the right to apply to the VCAT for an order that the document be released in full.

In two cases an applicant can apply to VCAT for an order that access be provided to the full document. First, where a decision refusing access to personal information has been made by an agency and communicated to the applicant in the normal way.

Secondly, where no notice of a decision about access has been received by the applicant within the 45 day period specified in section 21. In those circumstances, there is a deemed refusal by the agency to grant access to a document containing personal information to which Part IIIA applies. In either of the two cases, the applicant has 102 days to apply to VCAT for access to the full document. There does not appear to be any right of internal review of that decision refusing access on this ground.

If an application for access is made the agency must as soon as practicable notify the VCAT whether or not it objects to the disclosure of the information. It must also, if practicable, give written notice to the person the subject of the personal information:

- (a) informing that person of the right to intervene in the proceeding<sup>1</sup>;
- (b) requesting that person to inform the VCAT within 21 days of receiving notice whether or not the person consents to the disclosure of the personal information and, if not, whether or not that person intends to intervene in the proceedings; and
- (c) inform the person that if they do not inform the VCAT within 21 days, they will be taken to have consented to the disclosure of the personal information.

The VCAT must make an order granting access to the document if:

- (a) the agency informs the VCAT that it does not object to disclosure; and
- (b) either:
  - (i) the person the subject of the personal information consents (or is taken to have consented) to disclosure; or

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<sup>1</sup> The Bill amends the VCAT Act to expressly provide for a right of the person the subject of the personal information to intervene in a proceeding in respect of that document.

- (ii) VCAT is satisfied that it was not practicable for the agency to notify the person the subject of the personal information of the right to intervene, requiring consent and informing them of the deemed consent.

If an order is made granting access because of consents, the applicant is refunded the VCAT application fee. It is unclear at this stage what the refund situation would be if an applicant brings an application under Part IIIA which is successful based on consents and that application also seeks review of a decision refusing access to based on exemptions under Part 4 of the FOI Act.

If the matter is opposed either by the agency or the person the subject of the information, the VCAT can grant access only if it is satisfied that access is reasonable in all the circumstances. The onus is on the applicant to establish that access to the document would be reasonable in all the circumstances. This is different to the current situation where the onus is on the agency claiming exemption to prove the documents are exempt.

As a general rule, the FOI Act is based on the premise that the right of access is to the world at large and that an applicant need not provide any reasons for seeking access. Under the proposed Part IIIA provision, the Tribunal is expressly permitted to take into account the use that the applicant might make of the document. The Tribunal must not, however, grant access where it:

- (a) would be contrary to the public interest; or
- (b) would, or would be reasonably likely to, endanger the life or physical safety of any person.

If the Tribunal orders the granting of access and the person the subject of the personal information did not intervene in the proceeding, the Tribunal must, if practicable, give notice of the order to the person. The order does not take effect until the earlier of the time at which the notice is given to that person or 28 days after the order is made.

The personal affairs exemption in section 33 will also be slightly amended. The words "information relating to the personal affairs of any person" are defined to not include personal information as defined in the new Part 3A. This indicates that to the extent that the information in a document is of an identifying nature under Part 3A it must be dealt with under the new provisions and the onus shifts on the applicant to justify why it should be released. Other non-identifying information that relates to the personal affairs of a person will still need to be dealt with in the usual way, with the onus on the agency to establish the exemption.

## WHAT DOES IT MEAN FOR AGENCIES?

From an agency's point of view, it means that when access to documents is sought, it will be necessary to carefully look through the documents to ascertain whether they contain any personal information as defined. Then to determine whether it is personal information that is excepted from Part 3A – that is, does the applicant already know or ought the applicant know it or could the applicant reasonably obtain it from documents generally available for public inspection and purchase.

This will mean close liaison with the officers of the agency familiar with the facts. For example, there may be instances where the applicant has been dealing closely with an officer about a matter and is aware of his or her name and position. If the applicant then seeks documents disclosing that officer's name, it would be reasonable to conclude that the applicant knows or ought to know that officer's identity.

There will be other instances, say, where the person is identified in an annual report or the Victorian Government Directory. In a letter to the editor of The Age newspaper, the Attorney General stated that the names and other identifying details of Ministers, Departmental Secretaries and other office holders which are available on public registers and in publications such as the Victorian Government Directory will probably not be prohibited from access. This is because they can be ascertained from documents generally available to the public for inspection or purchase.

This means that FOI officers will need to be familiar with what types of publications are available freely to the public and the degree to which they identify certain officers of the agency.

It may also be that there will need to be a closer liaison with applicants in order to ascertain the extent to which they know a person's identity.

Where access to a document is refused or at least an edited document is made available with personal information deleted, if the applicant applies to the VCAT for review, it will be necessary to put in place appropriate processes for dealing with the application. For example, if the agency is notified that a proceeding has commenced, internal procedures must be put in place for that to be dealt with by the appropriate area of the agency. Will the legal area, the FOI area, the CEO's area, or some other area deal it with?

It will be necessary for the agency to notify the individual whose personal information is involved of the matters stated in the legislation, whether that person is within or outside the agency. Such notification must be made unless it is not practicable ie not able to be done. It is not enough if it is inconvenient to do so or not "practical".

The agency will need to promptly determine whether it objects to the disclosure of the personal information and notify the Tribunal accordingly.

It is important to remember that Part 3A introduces a distinction between "personal information" in Part 3A of the Act and "information relating to the personal affairs of any person". The latter phrase is defined to not include personal information. This means that any identifying material is "personal information" but other information about persons may or may not be about their personal affairs. The exemption in section 33 will still need to be applied and the difficulties associated with information about officers and the application of section 33 will still need to be grappled with.

It will also be necessary to consider whether a document is otherwise exempt even if it contains personal information. It may be that the Tribunal may conclude that part of the personal information may be released, but then there remains the issue of whether the document is otherwise exempt.

The Department of Justice will be conducting training sessions and will be making available written material in relation to the amendments. I recommend as many people as possible who need to deal with FOI on a daily basis attend the training sessions.