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VCAT Victorian Civil & Administrative Tribunal

VCAT response to questions on notice

1) **The Committee has received evidence that VCAT is staying or adjourning FOI proceedings because of a lack of Members to hear such cases and that, as a result, VCAT is dealing with a large backlog of FOI reviews. Do you have any comment to make on this situation?**

Since early 2023, VCAT has been adjourning most freedom of information ('FOI') cases to 'a date to be fixed', other than those which relate to an FOI request made by a Federal or State Member of Parliament or where the applicant satisfies the Tribunal that the matter should be prioritised.

Priority is given in a small number of cases, in circumstances such as:

- the information sought impacts on other proceedings before the Courts or VCAT;
- for some 'media applications' where the information sought may be of significant public interest; or
- where a person has an unusually strong reason for seeking documents, such as they relate to a death in the family.

Members advise parties of the situation, usually at the first directions hearings. VCAT orders adjourning cases give the reason, namely '[t]here is no VCAT member available to hear this matter at this time'. VCAT has answered questions from media about the situation.

The decision to adjourn most FOI proceedings has not been taken lightly (or 'quietly')[1].

On 15 March 2024, there are 220 pending FOI cases, which is 37 more matters (a 20% increase) on the number pending at 30 June 2022, being the last financial year before the decision was taken to adjourn proceedings.

The decision to adjourn most cases was taken in the context of:

- The limited number of VCAT members available for hearings in the Review and Regulation List ('R&R List') and the need to prioritise the timely resolution of cases that impact on a person's livelihood, such as health practitioner disciplinary cases, working with children check cases and other cases concerning occupational regulation. The Tribunal also prioritises cases where, otherwise, significant hardship may occur, e.g. applications for review of decisions of the Transport Accident

[1] Contrary to the suggestion of Dr Reuben Kirkham, Submission 53, 2.

Commission and applications involving the welfare of children, under the *Children Youth and Families Act 2005*.

- The fact that most FOI applications have already been the subject of independent review by the Office of the Victorian Information Commissioner ('Information Commissioner' or 'OVIC')).
- VCAT's current focus on reducing the substantial backlog in residential tenancy proceedings ('RT Backlog Recovery Program') which has prevented re-allocation of members from other lists to assist with FOI cases.

As a result of the appointment of 22 new legal members in December 2023 and January 2024, the RT Backlog Recovery Program is progressing ahead of schedule and it is anticipated that VCAT will be in a position by the middle of this year to write to parties about progressing FOI cases from around October 2024.

VCAT rejects the suggestions made by:

- Inner Melbourne Community Legal Centre (and related bodies) that 'Tribunal members often delay or defer hearing matters or making decisions'.[2]

  Two of the matters mentioned were withdrawn by the applicant before a scheduled hearing or compulsory conference, and only one has been adjourned to a date to be fixed, in line with the general position outlined above.

- Dr Reuben Kirkham that the decision to adjourn cases 'implies VCAT members are there to decide cases based on ministerial whims' or that 'an Administrative Tribunal is not an appropriate forum for hearing' such matters.

  While VCAT members do not enjoy the same level of institutional independence as afforded to judges,[3] each member is required to take an oath of office to: [4]

  > at all times and in all things do equal justice to all persons and discharge the duties of [their] office according to law and to the

[2] Inner Melbourne Community Legal Centre, Police Accountability Project and Melbourne Activist Legal Support, Submission 49, 21.

[3] See *Meringnage v Interstate Enterprises Pty Ltd* [2020] VSCA 30 [35] *et seq*.

[4] VCAT Act, s 16(4) and *Victorian Civil and Administrative Tribunal (Oath and Affirmation of Office) Regulations 2013* r 5.

> best of [their] knowledge and ability without fear, favour or affection.

While there is no constitutional impediment to judges of the Supreme Court engaging in merits review,[5] VCAT has jurisdiction to review decisions by the government and its agencies under more than 115 enabling enactments.

VCAT brings a consistent experienced approach to the review function which makes VCAT the most appropriate forum for such matters.

2) **From VCAT'S perspective, are there any legislative changes that would ease the Tribunal's FOI review workload?**

The legislative changes discussed in the responses to questions 4 and 7 would significantly ease the Tribunal's FOI workload and ensure that VCAT's limited resources are focused on resolving substantive issues in dispute (i.e. whether documents to which access has been refused are exempt under the FOI Act).

While not of the same order of magnitude as those matters, the legislature might also consider addressing the following matters:

- Making it clearer[6] that:
  - a 'document'[7] includes a discrete set of information (e.g. an email or a video) held by an agency electronically, including where that information is stored in a disaggregated manner on servers operated by third parties and the agency has the ability or right to access that information;
  - the retrieval of such information is not a request involving the use of computers addressed by section 19 of the FOI Act (which has implications for the access cost to FOI applicants); and
  - the form of access to such information can include the provision of an electronic file or document, or a device (such as a USB stick) containing the file or document.[8]

(Alternatively, the definition could be amended to include 'any record of information'[9] as is the case in the Commonwealth legislation,[10] or it

5 See *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2011] HCA 411.
6 See *EBT v Monash University* [2020] VCAT 440 and *Monash University v EBT* [2022] VSC 651.
7 FOI Act, s 5(1).
8 FOI Act, s 23.
9 Victorian Inspectorate, Submission 10, [17]-[29].
10 *Freedom of Information Act 1982* (Cth), s 4.

might even be appropriate to shift the focus of the FOI Act to access to 'information'.[11])

- Noting that the Information Commissioner is only rarely a party to a FOI proceeding,[12] clarifying that on review of a decision of the Commissioner, the respondent is:
  - the relevant agency, in the case of an application by the party who made the FOI request;[13] or
  - the FOI applicant, in the case of an application by the agency.[14]
- Incorporating criteria developed by the Tribunal for assessing particular exemptions into the relevant exemption provisions.

  For example, the criteria identified in *Friends of Mallacoota Inc v Department of Planning and Community Development* [15] for assessing whether disclosure of 'internal working documents'[16] would be contrary to the public interest are well settled.[17] Inclusion of the criteria in the FOI Act will help people making FOI requests and agencies dealing with FOI requests.
- Considering whether applicants should have a right to seek review by VCAT of a decision of the Information Commissioner confirming an agency's refusal to process an FOI request because it would substantially and unreasonably divert the resources of the agency (section 25A).

  Such applications rarely succeed.[18] Where an applicant succeeds, the only order VCAT can make is to require the agency to process the application,[19] which may still not deliver the applicant with the documents they seek.

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11 The Victorian Bar Incorporated, Submission 57, [10]-[11]. See also, Associated Professor Jennifer Beard, Submission 40, 2 and Inner Melbourne Community Legal Centre, Police Accountability Project and Melbourne Activist Legal Support, Submission 49, [3.4].

12 FOI Act, s 51(2). While the Office of the Commissioner is a party where a person requests documents from the Office, such cases are rare.

13 FOI Act, ss 50(1)(b) and 50(1)(c).

14 FOI Act, s 50(3D).

15 [2011] VCAT 1889, from para 51.

16 FOI Act, s 30.

17 Most recently considered in *Department of Transport v Davis* [2024] VCAT 79.

18 For a recent example, see *Draper v Victoria Police* [2023] VCAT 114.

19 See, for example, *Victorian Legal Services Commissioner v Grahame (No 2)* [2019] VCAT 1878 (albeit in relation to a decision refusing to process the FOI request based on section 25A(5) of the FOI Act).

Alternatively, if the right of an applicant to seek review is maintained, it may be appropriate to:

- provide a definition or include thresholds as to what amounts to a substantial and unreasonable diversion of the resources of an agency;[20]
- explicitly confirm that 'all related requests on foot and the recent request history of the applicant' are relevant considerations;[21] and/or
- excluding, from the scope of the review, whether the agency sufficiently consulted with the FOI requestor before making the decision. That issue has seen substantial litigation, but diverts attention away from the substantive issue as to whether the request involves unreasonable diversion of the agencies' resources.

- Putting it beyond doubt that the Tribunal does not have jurisdiction to consider the sufficiency of an agency document searches,[22] except (if the legislature considers it appropriate) on a 'decision taken to be refused'.[23]
- Amend section 53A of the FOI Act so that where VCAT receives an application where the FOI request is taken to be refused, and the department/agency makes a decision, that decision is the subject of the VCAT review, without the FOI requestor's agreement. The 'agreement condition' in the section is confusing, noting that as a practical matter, in conducting the review VCAT necessarily focuses on the 'actual' decision because the deemed decision is academic.

  Alternately, in the above situation, VCAT could be given discretion to transfer the application to the Information Commissioner for review. If considered appropriate, in circumstances where the FOI requestor disagreed with the Commissioner's decision, the application could be fast tracked when it returns back to VCAT (similar to the priority given to matters that are reconsidered by an agency under section 51A of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act')).

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20 Victorian Government Solicitor's Office, Submission 13 [10.1]-[10.2].

21 Ibid [10.3] and The Victorian Bar Incorporated, Submission 57, [24(b)]. VCAT already does this: see, for example, *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1236.

22 Refer to the discussion in *Chopra v Victorian Institute of Teaching* [2023] VCAT 903 comparing the views of Cavanough J in *McKechnie v Victorian Civil and Administrative Tribunal & Anor* [2020] VSC 454 and the Victorian Court of Appeal decision in *Chopra v Department of Education and Training* [2019] VSCA 298.

23 *Davis v Department of Health* [2021] VCAT 1490.

3) **What are your general observations on the need for parties to VCAT proceedings to be legally represented?**

In FOI proceedings:

- most applicants are individuals, who are rarely legally represented; and
- most respondents are government agencies, who have (and regularly exercise) the right to legal representation under section 62 of the VCAT Act.

As the onus of proof is generally on the respondent agencies,[24] it is appropriate that they continue to be represented.

As VCAT is not bound by the rules of evidence and can (and does) adopt flexible procedures, we do not consider there is a general 'need' for individual applicants to be legally represented in FOI proceedings.

4) **Should the Office of the Victorian Information Commissioner (OVIC) have power to compel agencies to make a decision with respect to a deemed refusal due to delay to avoid the need for FOI applicants to apply directly to VCAT in respect of such matters?**

No.

For the current financial year (and the preceding financial year), around 23% of applications concern a decision to refuse access to documents which is 'taken to have been made under section 53' by the relevant agency ('Deemed Refusal Decision').[25] In most cases, after an application is made, the agency makes a decision on the FOI request and the proceeding is extended to encompass the review of that decision.[26]

This tends to accelerate the progression of matters for those applicants that exercise the right to apply for review immediately upon the expiry of the 30 day (or extended) period allowed for the agency to make its decision,[27] as compared to those that agree to reasonable extensions.[28] Further, it bypasses the mechanism for external review by the Information Commissioner.

Unless agencies were provided with increased resources, such compulsion would create further delays for other FOI requests to the relevant agency

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24 FOI Act, s 55.

25 FOI Act, s 50(1)(ea). Separately, VCAT also reviews decisions to refuse access which are taken to have been made by the Information Commissioner: FOI Act, ss 49J(2) and 50(1)(b).

26 FOI Act, s. 53(5).

27 FOI Act, s 21.

28 FOI Act, s 21(2)(b).

(such as the well publicised delays at Victoria Police). There is risk of a flood of such requests to OVIC, which would likely help no one.

However, and related to this issue, the Tribunal would support the Information Commissioner having power to extend the time for the making of a decision on an FOI request in circumstances where the applicant has not agreed to an extension reasonably sought by the agency.

5) **As you are aware, under section 50(1)(g) of the *Freedom of Information Act 1982* (Vic), FOI applicants wishing to dispute access charges of an agency must apply directly to VCAT, and, in order for VCAT to hear and determine the matter, must obtain a certification from OVIC that the matter is of sufficient importance for the Tribunal to consider. Should OVIC have power to review agency access charges decisions?**

There have been very few decisions of the Tribunal considering the operation of section 50(1)(g) of the FOI Act.[29] Further, it appears there are very few requests made to the Information Commissioner for certification (eight in the 2022-23 financial year) and most are withdrawn (seven of the eight requests).[30] In these circumstances, there does not appear to be a need to change the FOI Act to give OVIC the power to review agency access charge decisions.

6) **The Committee has received evidence that OVIC should have power to conciliate all FOI complaints before they proceed to VCAT. What is your view?**

VCAT does not have jurisdiction to review a 'complaint' which is made to the Information Commissioner under section 61A of the FOI Act.[31]

Therefore, we make no comment apart from observing that we understand that OVIC properly and sensibly attempts informal mediation in terms of a person refining their FOI request and suggesting that an agency 'take another look' at the situation.

On a related issue, the Tribunal notes, but does not support, the submission of the Victorian Bar that 'instead of OVIC (or its successor) being required to make a decision [on a decision to refuse access to documents], it could [only] try and facilitate an agreed outcome'.[32] It is implied that, if

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29 See *Mickelborough v Victoria Police* [2016] VCAT 732, *EBT v Monash University* [202] VCAT 440 and *Chopra v Victorian Institute of Teaching* [2023] VCAT 341.

30 OVIC 2022-23 Annual Report 'Then. Now. Next', 78.

31 See *McKechnie v Office of the Chief Parliamentary Counsel (No 2)* [2020] VCAT 1430 [16] and *Den Brinker v Department of Health and Human Services* [2015] VCAT 2041 [12]-[13].

32 The Victorian Bar Incorporated, Submission 57, [43].

there is no conciliated outcome, the applicant could proceed to VCAT on application for review.

The decisions of the Information Commissioner perform an important filtering function. In the 2022/2023 financial year, only 67 applications were made to VCAT seeking review of a decision of the Information Commissioner (representing 20% of finalised decisions in that year).[33] Further, those decisions are published by OVIC[34] and play a normative role in guiding agencies as to the application of the exemptions under the FOI Act.

7) **The Committee has received evidence that VCAT should have power to declare a person a vexatious FOI applicant. What is your view?**

A significant aspect of VCAT's caseload is FOI applications made by a small number of individuals who have made repeated FOI requests, and who have often been unsuccessful in previous proceedings at VCAT. For example, one individual has made 116 applications since 2016, including 33 applications in the last 3 financial years.

In its submission, the Victorian Bar suggests that:[35]

> consideration should be given to empowering the VCAT, on the application of OVIC, to declare a person to be a vexatious FOI applicant such that any future request by the person can be made only with leave of the Tribunal.

OVIC has likewise recommended that there be a 'power for VCAT to declare a person to be a 'vexatious applicant' upon an agency making an application to the Tribunal', going on to suggest that:[36]

> VCAT is the most appropriate body to make this determination given the significance of removing a right for a person to make a request. VCAT has the ability to conduct an in person hearing and take evidence under oath or affirmation. If the power were given to the Information Commissioner, the determination would be made on the papers, thereby limiting the affected party's opportunity to be fully heard on a decision affecting their legal right to access government-held information.

While VCAT accepts there should be mechanisms in place to deal with vexatious FOI applicants, the Tribunal does not consider that creating a right for OVIC or an agency to apply to VCAT for a declaration is an appropriate mechanism. This is because it is unlikely that any declaration

33 OVIC 2022-23 Annual Report 'Then. Now. Next', 76 & 78.
34 See https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/decision-summaries/.
35 The Victorian Bar Incorporated, Submission 57, [25].
36 Office of the Victorian Information Commissioner, Submission 55, [443]-[444].

would be sufficiently timely to address the impact on agencies of vexatious FOI requests, having regard to the following considerations:

- The Tribunal already has the power, under the *Vexatious Proceedings Act 2014* (Vic) to make an extended litigation restraint order. This power has been exercised only once in relation to an FOI applicant.[37]
- Given the Tribunal's obligation to accord procedural fairness to the FOI applicant,[38] it would be necessary to convene a hearing to consider the application and hear from the applicant, which will add to (rather than ease) the workload of VCAT and inevitably lead to delay.
- Further delay may arise if FOI applicants apply for the presiding members to recuse themselves (or for the reconstitution of the Tribunal)[39] given the likelihood likely that any application would be heard by a member who has previously made an adverse decision on a FOI application involving the same party.
- A proper consideration of the application might require the Tribunal to revisit the merits of previous applications for review made by the FOI applicant, and in a worst case could result in a different view being formed.

Further, if a declared FOI applicant had a right to apply to the Tribunal for leave to make a further FOI request, this would also add to (rather than ease) the workload of the Tribunal (as well as OVIC or the relevant agency, depending on which entity is determined to be the appropriate respondent to such an application).

The Tribunal notes that other jurisdictions adopt alternative methods for addressing vexatious applicants.[40] Of these, VCAT considers the most appropriate option to be for the Information Commissioner to have the power to make a declaration (with or without conditions) based on specified considerations, as is the case at a federal level, in Queensland and in the Northern Territory.[41]

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37 *Victorian Civil and Administrative Tribunal v Smeaton* [2017] VCAT 659.

38 VCAT Act, s 98(1)(a).

39 VCAT Act, s 108.

40 Refer M Batksos, 'Vexations Applicant, Vexatious Application or Something Else? Dealing with difficult Applicants under Freedom of Information Laws in Australia', (2020) 27 *AJ Admin L* 137. See also Appendix 1 to the Victorian Ombudsman's submissions (Submission 60).

41 *Freedom of Information Act 1982* (Cth), ss 89K & 89L; *Right to Information Act 2009* (Qld), s 114, Information *Act 2002* (NT), s 42.

If thought appropriate, the FOI Act could provide a right for an applicant to seek review on the merits by VCAT of any declaration, as is the case in two of those jurisdictions.[42]

An alternative to a vexatious applicant procedure might be to change the costs regime for 'repeat applicants', such that they must pay VCAT's usual fees even if the FOI request relates to their personal information and/or, if unsuccessful, must pay the agencies' costs as determined by the Tribunal to be 'fair' or 'just' (in place of the standard presumption that each party bears its own costs).[43]

8) **Is there any benefit in introducing so-called 'kill-switch' orders (i.e., automatic dismissal of a proceeding if the applicant fails to comply with a VCAT order)?**

No.

Section 78 of the VCAT Act, which allows the Tribunal to order that a proceeding be struck out or dismissed if an applicant is conducting a proceeding in a way that unnecessarily disadvantages another party, including by failing to comply with an order or direction of the Tribunal, is sufficient.[44] VCAT can (and does) make 'self-executing orders' where appropriate, e.g. in the case of egregious non-compliance. Alternatively, failures to comply with orders may be relevant in relation to an application by an agency for its costs.[45]

9) **Other matters**

VCAT supports the recommendation from OVIC that it have access to FOI review application data held by VCAT to enable more accurate reporting.[46]

This should require de-identification of data by VCAT and/or the Commissioner such that reporting by the Commissioner complies with privacy requirements.

Amendments to the VCAT Act[47] would be required to implement this recommendation.

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42 *Freedom of Information Act 1982* (Cth), s 89N; *Right to Information Act 2009* (Qld), s 121.

43 A similar approach is adopted in relation to reviews under the *Transport Accident Act 1997* (Vic), s 79. Compare VCAT Act, s 109(1) which creates a presumption that each party bears their own costs.

44 The decision in *Benson v La Trobe University* [2011] VCAT 2064 is an example of an application on this basis, albeit dismissed.

45 VCAT Act, s 109(3)(a)(i). See, for example, *Smeaton v Victorian Workcover Authority (No 2)* [2010] VCAT 741.

46 Office of Victorian Information Commissioner, Submission 55 [682].

47 Including VCAT Act, ss 34, 35 and 36.