

Monash University v EBT [2022] VSC 651

This decision considered whether documents held and stored electronically by or on behalf of an agency are considered 'documents' for the purposes of section 5 of the Act. The Supreme Court held that these documents are considered 'documents' under section 5 and should be provided in accordance with the ordinary operation of the Act rather than only in the particular circumstances referred to in section 19 as contended by the applicant.

The Facts

FOI Request

On 25 September 2018 the Applicant made an FOI request for access to certain emails, notes, summaries and reports relating to a completed workplace investigation concerning him.

The Agency estimated that access would attract access charges totalling \$541.40. The access charges had been calculated as an estimate of the reasonable costs incurred in providing written documents from electronically stored sources under Item 7 in the Schedule to the Access Charges Regulations.

On 24 October 2018 the Applicant paid the access charges in full.

On 10 December 2018 the Agency notified the Applicant of its decision on the request. The Agency identified 50 documents failing within the request. It released 3 in full, nine in part, 13 in full or in part outside the Act and refused access to 25 in full.

The Agency also advised it was imposing actual access charges of \$878.49 but was discounting by 25% for documents administratively released. Therefore, the net total amount of the access charge was \$658.87. The Agency advised that these charges had been calculated in accordance with section 17.

The Applicant paid the remainder of the access charges.

On 13 December 2018 the Applicant requested OVIC conduct a review of the decision, and sought certification that the agency's decision to impose the access charges is one of sufficient importance for VCAT to consider.

OVIC Review

The access charges matter was dealt with separately to the review.

OVIC found that the documents requested were on the Agency's electronic documents/email system and on other databases and that each of the documents existed in a discrete form. Therefore, it was not open to the Agency to impose access charges under Item 7. The documents existed and could be located through searches, and required printing, rather than 'producing' under section 19.

OVIC therefore issued a certificate under section 50(1)(g) of the FOI Act and the Applicant applied to VCAT.

VCAT Review

VCAT appeared to accept the Agency's position that the scattered and mixed up electronic or digital material was 'information' within the meaning of the FOI Act and Item 7 of the Access Charges Regulations. However, VCAT rejected the Agency's conclusion that they could impose access charges on the basis that the documents were available in a discrete form, and because the documents sought related to the Applicant's personal affairs.

Agency Submissions

In short, the Agency contended that

- documents stored only in electronic form by or on behalf of a government are not 'documents of an agency' at all within the meaning of the FOI Act;
- access to them is not available to other persons under the ordinary access provisions of the FOI Act;
- that an Agency that stores the documents can only be required to give access to them in the particular circumstances referred to in section 19, being a section that refers to computers; and
- as a result, agencies are generally able to charge much higher fees for giving access to 'documents' stored electronically than for giving access to documents kept in paper form or in other form.

The Agency submitted in relation to the meaning of the word 'document':

- the definition of 'document' in section 5 and the terms of section 19 are out of date and do not recognise the concept of an electronically or digitally stored 'document.'
- The definition of 'document' in section 5 is exhaustive rather than inclusive
- The language of the definition of 'document' means that the only 'document' in the electronic or digital universe is the relevant 'device' as distinct from anything that may be extracted or derived or retrieved from the 'device.'

- It would therefore be impracticable or absurd to suggest that an agency must give ‘access’ to a ‘device’ such as a network of computers, or to the equipment used by Google to provide its cloud storage services to customers.
- It would also be impracticable for an agency to give ‘access’ to a single computer disc if the disc encompassed more than the ‘document/s’ sought
- The only relevant acknowledgement of computers in the FOI Act is in section 19, meaning that material stored in computers should only be dealt with under section 19.

The Agency submitted in relation to section 19:

- That VCAT erred in its reliance on the Agency’s ability to retrieve the emails and other things. Because the things requested had not been retrieved as at the moment of the receipt of the request, then the information was not in a discrete form. Something further had to happen.
- Software, operated through the graphical interface of a computer would be required collate the information from the various discs by using search terms and once it was collated, to decode into English and produce in a written document.
- Therefore, access charges could be imposed under Item 7 of the Schedule to the regulations.

The Decision

The Supreme Court’s decision was that a thing is a ‘document of an agency’ if it is a record of information and is kept by or on behalf of an agency, regardless in which way the thing is stored.

The Attorney-General applied to intervene in this matter as an *amicus curiae*.

Definition of ‘document’

The Supreme Court found that the Agency’s submissions as to the meaning of ‘document’ were wrong for the following reasons:

- The Agency’s interpretation of ‘document’ would be inconsistent with Parts II and III of the Act as originally enacted. It would be an extraordinary consequence if records of information stored only electronically or digitally were not documents for the purposes of Part II, and section 19 would provide no answer for this as it is in Part III. Additionally, Parliament would have wasted much effort crafting exemption provisions if access to documents held electronically were not considered documents.
- The definition of ‘document’ is inclusive, not exhaustive. The definition contains the word ‘includes,’ each sub-paragraph begins with the word ‘any,’ and Parliament expressly listed a large range of things in the definition of ‘document.’
- The FOI Act as it stood in 1982 made it clear that ‘a document of an agency’ meant a ‘record of information’ of an agency, and it was quite clear that a record of information was and is no less a record of information because it was or is in electronic or digital form.

The Supreme Court also found that the true construction of the expression 'document of an agency' is beyond doubt by virtue of various amendments to the FOI Act since 1982.

- Amendments introducing references to Internet sites treat things 'published to' an Internet site as a document and envisage that they will be stored there so that 'access' can be had.
- Legislation is 'always speaking' and so interpreting a record of information stored electronically or digitally by or on behalf of an agency as a 'document of an agency' supports the purpose of the FOI Act.

The Supreme Court also pointed to decisions showing that it has never really been doubted that distinct or discrete records of information stored electronically are 'documents.'

The Supreme Court then turned to related legislation to show that the Agency's interpretation of the meaning of the word 'document' would put the FOI Act out of harmony with other legislation.

- The *Public Records Act* – the PR Act defines record as anything that is a document within the meaning of the Evidence Act – a definition that is similar to that in the FOI Act. The PROV issues standards and has an electronic records strategy, and there was evidence that the Agency operates on a paperless basis. If the Agency did not keep full and accurate records then they would be in breach of the PR Act. Therefore, it was 'artificial' for the Agency to contend that the documents it stores in electronic form are not 'documents of an agency'
- The *Health Records Act* – there are cross references between the HR Act and the FOI Act. The HR Act provides a right of access to documents by inspecting health information stored in electronic form, meaning that it envisages that a record of health information stored electronically is a document. If the Agency's submission prevailed, this would put the FOI Act at odds with the HR Act.
- The *Electronic Transactions (Victoria) Act* – the ETV Act provides that certain requirements surrounding writing and signatures will be met if done electronically. Therefore, the ETV Act authorises the digital strategy of PROV and renders 'quite artificial' the submission by Monash that the FOI Act does not recognise an electronically stored document as a document.

Section 19

The Supreme Court found that the ordinary access provisions of the FOI Act were applicable to the Applicant's request, therefore section 19 was not applicable.

The Supreme Court agreed with OVIC and said that section 19 is limited to cases where the agency does not have in its possession the document or documents to which access has been sought, but does not an ability to produce a document that will contain information of a kind that the requestor appears to desire to have.

The Supreme Court said that VCAT should have held that section 19 did not even have *prima facie* application to the request, however VCAT came to a decision that was correct. VCAT made no material error of law.

Orders

Leave to appeal was granted but the appeal was dismissed.

Key takeaways

For the purposes of the FOI Act and the Access Charges Regulations, a thing is a 'document of an agency' if it is a record of information and is kept by or on behalf of an agency, regardless of the way in which the thing is stored.

Section 19 does not apply where a request is made to an agency for access to a particular pre-existing 'document' that is in the possession, power or control of the agency, notwithstanding that it may be stored electronically.