

CASE NOTE

Chopra v Victorian Institute of Teaching (Review and Regulation) [2023] VCAT 903 (4 August 2023)

This decision considers whether VCAT has jurisdiction to review an actual or deemed refusal on the basis of non-compliance with section 17. The key takeaway from this decision is that VCAT has jurisdiction to determine an application for review of an actual or deemed refusal of a request based on section 17(2) of the FOI Act.

The Facts

The Applicant made an FOI request in February 2022. The request contained 22 items.

In March 2022 the Agency wrote to the Applicant seeking clarification on the request on the basis it was ‘ambiguous and uncertain.’ The Agency invited the applicant to consult and put the Applicant on notice that if no consultation was commenced the Agency may refuse to process the request.

The Applicant latterly made an application to VCAT on the basis of deemed refusal under section 50(1)(ea).

In April 2022, the Agency refused to respond to the request on the basis it did not comply with section 17(2).

The Agency made an application to VCAT for directions and an order that the application for review be dismissed because:

- The applicant’s FOI request did not comply with section 17 of the FOI Act
- VCAT lacked jurisdiction because there had been no decision to refuse access in accordance with a request taken to have been made under sections 53(1) and 50(1)(ea)

- The application for review was misconceived

On the first day of the hearing, Acting DP Dea considered the proper course was to consider the effect of the Supreme Court of Victoria, Court of Appeal decision in *Chopra v Department of Education and Training (COA Chopra)* and the effect of Cavanough J's subsequent decision in *McKechnie v Secretary for the Department of Justice and Community Safety (McKechnie)*. Depending on which decision was to be applied, either further hearing would be required (COA Chopra) or the application would be struck out (McKechnie).

Submissions

Agency

The Agency submitted that VCAT was bound by McKechnie, submitting that the ratio of McKechnie was that if section 17 is not complied with, a valid request does not exist and no deemed refusal can arise because there was never a request. Therefore, VCAT does not have jurisdiction.

The Agency submitted that the comments in COA Chopra were dicta as the decision in COA Chopra was that the referral of a question of law under section 96 VCAT Act was invalid, meaning that the COA lacked the jurisdiction to determine any of the questions relating to section 17.

Applicant

The Applicant submitted that VCAT was bound by the COA Chopra decision and that VCAT had the power to review the refusal to process the request.

The Applicant submitted that McKechnie was concerned with section 17(2A) of the FOI Act and not section 17(2), meaning that any commentary on section 17(2) was dicta.

The Discussion

VCAT's role in the court hierarchy

Acting DP Dea considered VCAT's role in the hierarchy of courts. She considered an article written by Sir Anthony Mason in 1988 which observed that the doctrine of precedent operates vertically to bind the courts lower in the hierarchy of a legal system; while stare decisis applies as a more flexible principle to a court at a hierarchy level in regard to its own or lower decisions.

Acting DP Dea considered that the doctrine of precedent means that VCAT, as a tribunal that is lower in the judicial hierarchy of Victoria, is bound to follow and apply the decision of a court above it in the hierarchy to which it belongs, unless that decision can be properly distinguished. Acting DP Dea considered that it is not VCAT's role to resolve the tensions between COA Chopra and McKechnie.

Acting DP Dea then turned to considering COA Chopra and McKechnie.

COA Chopra

Acting DP Dea set out the facts of COA Chopra. The matter arose from a referral of questions of law from VCAT under section 96(1) of the VCAT Act in a matter where the Agency had found an FOI request containing multiple items to be invalid as paragraph 4 of the request was not sufficiently clear under section 17(2). The questions were:

- (a). Does a request in terms of paragraph 4 of the Applicant's request provide such information concerning the document as is reasonably necessary to enable a responsible officer of the Respondent to identify the document, and so, confirm with section 17(2) of the FOI Act
- (b). If paragraph 4 of the request does not conform, is the whole of the request valid?

The Court of Appeal reached the following conclusions:

- (a). The consent requirement in section 96 of the VCAT Act was not satisfied, therefore the referral was invalid
- (b). If the COA was wrong and the referral was valid, then
 - (i). They would be unable to answer question¹
 - (ii). They would reformulate question 2 as – if an item of a request for access to the documents that contains multiple items does not comply with section 17(2) of the FOI Act when the request is made, will the whole request necessarily be permanently invalid? And
 - (iii). The answer to question 2 is 'No because the severance principle may in certain circumstances apply to overcome an initial invalidity.'

On Question 2, the COA said the following in relation to validity of requests under section 17:

- An Agency must inform the applicant which items of a multi-item request do not comply with section 17(2) and why;

¹ The COA was not able to answer question 1 because the statement of agreed facts did not set out essential facts and did not identify the nature of any ambiguity in paragraph 4 of the request.

- The Agency must give the applicant an opportunity to modify the request by amending or severing the items which are said to not be compliant;
- If an applicant is not prepared to amend or sever any part of the request, the agency may

–Where it is persuaded by the applicant that all parts of the request are compliant – decide to accept the whole request

–Where it is not persuaded – refuse to process all parts of the request on the basis that the non-compliant part invalidates the whole request

The COA then said that there is no reason that this cannot be done during a VCAT proceeding as VCAT has the same powers as the Agency under section 50(4) of the FOI Act, or section 51 and 51A of the VCAT Act. Therefore, COA considered that VCAT has jurisdiction to determine an application for review of an actual or deemed refusal of a request based on section 17(2) of the FOI Act.

The COA did not agree with prior decisions of VCAT which held that, where an application for review is based on an actual or deemed refusal of access in respect of a request which does not comply with section 17(2), VCAT lacks jurisdiction because the request was not valid meant that there is no refusal. The COA found that the filing of an application for review confers jurisdiction on VCAT. The COA also observed that it would be inappropriate for an agency to seek an order under section 75(1) for summary dismissal or strike out of an application of this kind as those kinds of orders should only be sought where the application is frivolous, vexatious or an abuse of process.

McKechnie

Acting DP Dea set out the facts of McKechnie: A prisoner requested the FOI application fee be waived however the Agency did not grant the waiver on the basis no evidence of hardship was provided. The dispute went to OVIC and then VCAT. The Agency made a section 75 application on the basis that VCAT had no jurisdiction. VCAT made orders for summary dismissal because it had no jurisdiction. The Applicant then made an application for judicial review to the Supreme Court.

Cavanough J found that the proceeding was irregular and ill-founded as it had been brought incorrectly and out of time, therefore the proceedings were dismissed on that basis. Nonetheless, Cavanough J said that VCAT was correct to determine it had no jurisdiction because the FOI request was not valid and it is fatal to VCAT's jurisdiction if the relevant request for access was invalid at the time of 'any putative decision or deemed decision of the agency or Minister.'

Cavanough J considered that the COA decision was obiter and did not conform with relevant statutory provisions and that it should not be followed.

The Decision

Acting DP Dea considered that Cavanaugh J's statements regarding COA Chopra and section 17 were obiter because the reasons for dismissing the proceedings did not require consideration either of those matters. She also considered that the COA's comments on section 17 in COA Chopra were also obiter because the order dismissing the proceeding arose directly from its finding that the referral was invalid and that it had no power to make findings about the subject matter of the referral. Acting DP Dea then had to consider which dicta to apply. She considered that the only proper course was to follow the directives of the highest court in the hierarchy – the Court of Appeal, and found that she was bound by COA Chopra.

As to the next procedural steps, Acting DP Dea turned to what the COA described where a proceeding has been brought to VCAT on the basis of a deemed refusal and there is a dispute about whether the multi-item request is valid under section 17(2):

- The Agency must comply with its obligations under section 17(4). Acting DP Dea would allow the parties a further opportunity to consult
- If the Agency determines the request is valid, they may notify the Applicant and VCAT that it will proceed. VCAT will make orders setting aside the decision under review and substituting a decision that the modified request complies with a direction for the Agency to comply. The proceeding would be complete and the Applicant would also be entitled to seek review of a decision by OVIC and then VCAT.
- If the Agency maintains the request is not valid – the Applicant is entitled to amend or sever items
- If the request is not modified after further consultation with VCAT and VCAT determines that the FOI request as a whole is invalid, it may make a final order under section 51(2)(a) of the FOI Act affirming the agency's decision and dismissing the application

Orders

The proceeding was listed for an administrative mention in September 2023

The parties must write to VCAT with the outcome of their further consultation under section 17

After the administrative mention, orders will be made in chambers:

- (a). If the parties have agreed on a final form of the request, under section 51(2)(c) setting aside the Agency's decision that the request was not valid and substituting a decision that the request is to be valid and processed; or
- (b). For preparation on a hearing on whether the request is valid.

The Principal Registrar is directed to refund to the applicant the fees he paid previously for summonses to give evidence.