

# Is technology killing freedom of information?

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*Mick Batskos\**

Advances in technology have consequences, particularly where there are crossovers between platforms as technology develops. Many of us have lived to see that:

- in music, vinyl records were overtaken by CDs, which have in turn largely been overtaken by online streaming services like Spotify;
- super 8 movie film was overtaken by Beta and VHS videotapes, which in turn were overtaken by DVDs and Blu-ray discs, which have largely been overtaken by online streaming services like Netflix; and
- with ‘Video killed the radio star’,<sup>1</sup> music videos gave birth to MTV.

Similar developments have taken place in visual communications in the worlds of business and government, moving from letters (or snail mail) to telegrams, telegrams to telexes, telexes to faxes and now to the most common form of communication in visual form: emails. We have also seen a move from security-related CCTV being recorded on tape to being recorded and stored electronically on computer drives or similar hardware.<sup>2</sup>

When it comes to the business of government, technological advances have caused — and continue to cause — challenges to records managers, particularly in light of obligations on government bodies to ensure full and accurate records of the business of the agency be created and kept.<sup>3</sup> This is especially challenging in the context of the numerous types of electronic devices on which information relating to agency business can be generated, stored and communicated, as well as the format — namely, audio and visual, including text and images (still and moving).

This article will look at how some freedom of information (FOI) legislation, developed in the 1970s and originally enacted in the 1980s, grapples with some aspects of those technological advances — in particular, whether FOI legislation adequately copes with advances in technology when it comes to providing access to electronically stored information.

The focus of this article will be on the *Freedom of Information Act 1982* (Vic) (Vic FOI Act) and the *Freedom of Information Act 1982* (Cth) (Cth FOI Act).

After looking at some definitions and structural or operational differences between those two Acts, we will look at how each of those Acts might deal with three different fact scenarios and, particularly, the types of issues that can arise for agencies relating to:

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1 Song, The Buggles (1980).

2 For present purposes I will ignore oral communications and the more recent move from telephone calls to videoconferencing.

3 See, for example, *Public Records Act 1973* (Vic) s 13.

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- a. form of access;
  - b. partial access; and
  - c. access charges.

## Document or information

In looking at how FOI legislation copes with electronically stored information, it is first necessary to look at how the legislation treats or categorises electronically stored information, bearing in mind the objects of each Act.

Interestingly, although both the Vic FOI Act and Cth FOI Act include in their title the reference to freedom of 'information', the operational provisions in both have an emphasis on 'documents' rather than information as such.

### **Object — Vic FOI Act**

The object clause in the Vic FOI Act has remained unchanged since it was enacted in 1982.<sup>4</sup> It states that:

[The object of the Vic FOI Act is] to extend as far as possible the right of the community to access to *information* in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes.<sup>5</sup>

This is done, among other things, as follows:

a general right of access to *information in documentary form* in the possession of Ministers and agencies [is created,] limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.<sup>6</sup>

The section then reiterates that it is Parliament's intention that the Act be interpreted in a way to further the object and that 'any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of *information*'.<sup>7</sup>

The right of access created in s 13 of the Vic FOI Act then goes on to state that the right of access that exists in every person is to obtain access in accordance with the Act to 'a document of an agency other than an exempt document'. Section 17 sets out the requirements for a person wishing to obtain access to 'a document of an agency' or Minister: access requests can in certain circumstances be transferred to any agency which has a 'copy of the document' sought;<sup>8</sup> only upon payment of any access charges is access given to

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4 *Freedom of Information Act 1982 (Vic)* (Vic FOI Act) s 3.

5 *Ibid* (emphasis added).

6 *Ibid* (emphasis added).

7 *Ibid* (emphasis added). See also s 16(1).

8 *Ibid* s 18.

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‘the document’;<sup>9</sup> s 23 sets out the forms of access to a document; s 25 sets out when access may be given to part of a document with exempt or irrelevant matter deleted; and pt IV sets out when a document is an exempt document.

### **Object — Cth FOI Act**

It is interesting to note that the object clause in the Cth FOI Act has changed over time. When first enacted in 1982, it was in almost identical terms to the subsequently enacted Vic FOI Act described earlier.

With the introduction of the Information Commissioner review regime in 2010, the old objects clause was repealed and substituted by two new provisions.<sup>10</sup> The key aspects of the new objects clauses relevant for present purposes are as follows:<sup>11</sup>

1. The objects are to give the Australian community access to information held by the government by publishing certain *information* and ‘providing a right of access to *documents*’.
2. Parliament’s intention is to ‘increase recognition that *information* held by the government is to be managed for public purposes, and is a *national resource*’.
3. Parliament’s intention is that powers and functions under the Cth FOI Act are exercised and performed as far as possible to ‘facilitate and promote public access to information, promptly and at the lowest reasonable cost’.
4. They emphasise that the Cth FOI Act is not intended to affect any potential power of an agency officer to publish or give access to information or a document.

As with the Vic FOI Act, under the Cth FOI Act the right of access created in s 11 states that the right of access that exists in every person is to obtain access in accordance with the Act to ‘a document of an agency other than an exempt document’. Section 15 sets out the requirements for a person wishing to obtain access to ‘a document of an agency’ or Minister: access requests can in certain circumstances be transferred to any agency which as a ‘copy of the document’ sought;<sup>12</sup> only upon payment of access charges payable must access be given to ‘the document’;<sup>13</sup> s 20 sets out the forms of access to a document; s 22 sets out when access may be given to part of a document with exempt or irrelevant matter deleted; and pt IV sets out when a document is an exempt document (either fully or conditionally).

Given that under both the Vic FOI Act and the Cth FOI Act the emphasis and structure of the operational provisions is on access to ‘documents’ and not ‘information’ as such, it is important to see how electronically stored information is treated under each Act.

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9 Ibid ss 20, 22.

10 See *Freedom of Information Amendment (Reform) Act 2010* (Cth) s 3 and sch 1, inserting a new s 3 and s 3A into the *Freedom of Information Act 1982* (Cth) (Cth FOI Act).

11 Emphasis added. The other changes to the objects clause emphasised the democratic basis for FOI and greater access.

12 Cth FOI Act s 16.

13 Ibid s 11A.

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## Document — Vic FOI Act

Under the Vic FOI Act a 'document' is defined in s 5(1):

**document** includes, in addition to a document in writing —

- (a) any book map plan graph or drawing; and
- (b) any photograph; and
- (c) any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever; and
- (d) any disc tape sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (e) any film negative tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom; and
- (f) anything whatsoever on which is marked any words figures letters or symbols which are capable of carrying a definite meaning to persons conversant with them; and
- (g) any copy, reproduction or duplicate of any thing referred to in paragraphs (a) to (f); and
- (h) any part of a copy, reproduction or duplicate referred to in paragraph (g) —

but does not include such library material as is maintained for reference purposes;

Some important and interesting features of this definition of 'document' for present purposes include the following. First, the definition is an inclusive one. It includes items (a) to (h) 'in addition to a document in writing'. That in itself starts to raise immediate questions as to what is meant by 'a document in writing'.

Secondly, it includes any *disc or other device* in which sounds or other data (not being visual images) are embodied so as to be capable of being reproduced from the disc or other device with or without the aid of some other equipment.<sup>14</sup> The important thing to note that if this paragraph of the definition applies to a situation, it is the disc or device which is the 'document'.

Thirdly, when it comes to visual images stored electronically, that is, not on a film, negative or tape, the document is the device in which the visual images are embodied so as to be capable of being reproduced from the device, with or without the aid of some other equipment.<sup>15</sup>

Fourthly, when it comes to copies, a 'document' also includes a copy, duplicate or reproduction of any 'thing' referred to in an earlier paragraph of the definition. In the case of the devices in which data or images are embodied, the 'thing' must therefore, be a reference to 'the device' in which the data or images are embodied. What is a copy of the device?

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<sup>14</sup> Ibid s 5(1) para (d).

<sup>15</sup> Ibid para (e).

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Fifthly, a 'document' includes a part of a copy. Bearing in mind a copy is a copy of any 'thing', and for many paragraphs of the definition of 'document' the thing is the device, how can you have part of a device?<sup>16</sup>

### **Document — Cth FOI Act**

So how does the Cth FOI Act define a document? Section 4 of the Cth FOI Act defines 'document' in the following terms:

**document** includes:

- (a) any of, or any part of any of, the following things:
  - (i) any paper or other material on which there is writing;
  - (ii) a map, plan, drawing or photograph;
  - (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
  - (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
  - (v) any article on which information has been stored or recorded, either mechanically or electronically;
  - (vi) any other record of information; or
- (b) any copy, reproduction or duplicate of such a thing; or
- (c) any part of such a copy, reproduction or duplicate;

but does not include:

- (d) material maintained for reference purposes that is otherwise publicly available; or
- (e) Cabinet notebooks.

Some interesting features of this inclusive definition of 'document', when compared to the definition in the Vic Cth Act, include the following. First, the definition comprises a list of 'things' which can be a document. One of them is 'any paper or other *material* on which there is writing'.<sup>17</sup>

Secondly, a document includes *any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device*.<sup>18</sup> It may or may not be significant, but it is noticeable that a distinction is potentially made between an 'article' and a 'device'. Therefore, for example, can an article from which writings are capable of being reproduced be different from a device? This might be of importance for other parts of the definition of 'document' as well.

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<sup>16</sup> Note that it has been held that, although a 'document' includes a copy or part of a copy, it might not include a part of a document for all purposes under the Vic FOI Act: *University of Melbourne v McKean* [2008] VSC 325 [26] (Kyou J).

<sup>17</sup> Cth FOI Act s 4, para (a)(i).

<sup>18</sup> *Ibid* para (a)(iv).

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Thirdly, a document includes any article on which information has been stored or recorded, either mechanically or electronically.<sup>19</sup> Does this help clarify the meaning of ‘article’ or ‘device’ in the previous paragraph? When it comes to electronically stored information, the ‘thing’ which is the document in this paragraph is the article ‘on’ which information has been stored electronically.

Fourthly, another ‘thing’ which can be a document is ‘any other record of information’.<sup>20</sup> Note it does not refer to ‘any’ record of information; rather it is any ‘other’ record of information, presumably other than the previous references to records of information in the definition. The *FOI Guidelines*<sup>21</sup> suggests that ‘document’ can include information held on or transmitted between computer servers, backup tapes, mobile phones and mobile computing devices.<sup>22</sup>

### **Requests involving use of computers et cetera**

Both of the FOI Acts examined in this article have a specific section which exists to deal potentially with some of the issues arising in relation to information stored electronically. We will have a look at each of them before examining how each Act copes with requests for particular types of information.

#### ***Vic FOI Act***

Section 19(1) of the Vic FOI Act provides:

- (1) Where —
  - (a) a request is duly made to an agency;
  - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
  - (c) the agency could produce a written document containing the information in discrete form by —
    - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
    - (ii) the making of a transcript from a sound recording held in the agency —

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

Some important features of this provision are as follows. First, this is the first section in the Vic FOI Act which places an emphasis on a request seeking access to ‘information’ as distinct from ‘documents’. As we saw earlier, the emphasis is on the right of access

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19 Ibid para (a)(v).

20 Ibid para (a)(vi).

21 Office of the Australian Information Commissioner, *FOI Guidelines* (June 2020). Under the Cth FOI Act, s 93A, regard must be had to the *FOI Guidelines* for the purposes of performance of a function or exercise of a power under that Act. See generally Mick Batskos, ‘The Unsettled Status of *FOI Guidelines* of the Australian Information Commissioner’ (2021) 101 *AIAL Forum* 65.

22 Office of the Australian Information Commissioner (n 21) [2.30].

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to documents or information in document form. There is a bit of incongruence here when you note that for s 19 to come into consideration there must first be a 'duly made request'. Presumably, this is a reference to a request made in accordance with the requirements in s 17 of the Vic FOI Act.<sup>23</sup> We saw earlier that one of the requirements is for the request to provide such information as is reasonably necessary to enable the agency to identify the 'document' sought, not the *information* sought.

Secondly, it must appear from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency. Note that it does not say that the information is not available in *written* documents of the agency.<sup>24</sup>

Thirdly, the agency could produce a *written* document containing the information in discrete form by use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information.

If all three requirements in s 19 are satisfied then there is an obligation on the agency to deal with the request as if it were a request for access to the 'written document so produced and containing that information'. The 'written document so produced' is treated as the document in possession of the agency for the purposes of dealing with the request under the Act.

### **Cth FOI Act**

Section 17(1) of the Cth FOI Act provides:

- (1) Where:
  - (a) a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;
  - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and
  - (ba) it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and
  - (c) the agency could produce a written document containing the information in discrete form by:
    - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
    - (ii) the making of a transcript from a sound recording held in the agency;

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

As with s 19 of the Vic FOI Act, s 17 of the Cth FOI Act anticipates that there is a request made in accordance with the formal requirements of the Act — here, s 15(2) of the Cth FOI Act. First, the same incongruence exists here, with s 15 requiring information concerning

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<sup>23</sup> Note also s 5(1) of the Vic FOI Act defines 'request' to mean one made in accordance with s 17.

<sup>24</sup> Compare with Cth FOI Act s 17.

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the 'document' sought to enable it to be identified — it is not about access to information as such.

Secondly, it appears from the request that the applicant's desire is for information that is not available in discrete form in *written* documents of the agency. By contrast, the Vic FOI Act asks whether the information sought is not available in discrete form in 'documents', not limited to *written* documents. The insertion of the reference to 'written' document occurred in the October 1991 amendments to the Cth FOI Act.<sup>25</sup>

Thirdly, there is an additional requirement which does not have an equivalent in the Vic FOI Act — that is, it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information sought is recorded. This was also inserted in the 1991 amendments to the Cth FOI Act.<sup>26</sup>

These amendments to s 17 in 1991 were made in direct response to and acceptance of a December 1987 recommendation of the Senate Standing Committee on Legal and Constitutional Affairs.<sup>27</sup> That Senate committee recommended that the Act be amended to provide for access in the form of provision by an agency or Minister of a computer tape or disk containing a copy of the requested document.<sup>28</sup> It accepted that:

In some cases, it will be both cheaper for agencies and more useful for applicants if access is given to the document requested by providing access to a tape or disk containing a copy of the document (information) rather than to that information in printed form. The Committee considers that the Act should provide for such access.<sup>29</sup>

The effect of these provisions is that, if it appears from a request that an applicant seeks access to a computer disk containing the information, s 17 will have no role to play, as access can be provided in that form rather than requiring that it be provided in a written (that is, printed) form. However, it is interesting to note that s 20 of the Cth FOI Act, which deals with forms of access, was not amended to make this clearer.

Fourthly, as with the Vic FOI Act, there is requirement that the agency could produce a *written* document containing the information in discrete form by use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information.

If all four requirements are satisfied then, as in Victoria, s 17 of the Cth FOI Act provides that there is an obligation on the agency to deal with the request as if it were a request for access for the written document so produced containing that information. The written document so produced is treated as the document in possession of the agency for the purposes of dealing with the request under the Act.

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25 *Freedom of Information Amendment Act 1991* (Cth) s 12.

26 *Ibid.*

27 Commonwealth, *Parliamentary Debates*, Senate, 14 August 1991, p 302, second reading speech for Freedom of Information Amendment Bill 1991.

28 Senate Standing Committee on Legal and Constitutional Affairs, *A Report on the Operation and Administration of the Freedom of Information Legislation* (December 1987) p 91, [6.9].

29 *Ibid* p 90, [6.8].



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## Scenarios

As foreshadowed above, we will now look at issues which may arise for agencies in dealing with requests for access in three different scenarios involving electronically stored information or data. In each situation, we will assume that there are no hard copy written records or documents; nothing has been printed out or exists in hard copy. We also assume that what is sought by the FOI applicant only exists as electronically stored information within an agency, on hard drives on computers of the agency or on cloud storage.

For each of the three scenarios, we will consider issues which might arise depending on whether the agency is a Victorian agency or Commonwealth agency. The types of issues considered relate to:

- form of access;
- partial access; and
- access charges.

### **Scenario 1 — data**

Your agency commissioned a private company to develop an online survey which comprised individual participants responding to about 20 questions once they had provided some basic information about things like gender, suburb, age range and ethnicity. Each question results in a response from 1 to 10, where 1 indicates 'strongly disagree' and 10 indicates 'strongly agree' — that is, the results are a numerical score and not a written, qualitative response.

The survey was conducted online and the 12,236 individual responses were recorded on your agency's computers in a proprietary database developed by the company but which your agency purchased to use under licence. Some senior IT staff in your agency were thoroughly trained on how to deal with the database, including conducting interrogation of the database, generating reports which could be displayed on screen or printed and, if necessary, performing minor tweaks to the coding of the database to enable different types of interrogation of the data not already provided for in the standard version of the database.

Your agency was proud of this achievement and published the 20 questions and a summary of *all* the total responses. A journalist, known to be on a crusade about discrimination against Arabic speaking people in Australia, has now sent in an FOI request seeking information about 10 of the questions, broken down by suburb, gender, and ethnicity. He seeks not just a summary of all the responses to those questions but also the individual responses themselves. He seeks a copy of that information in an Excel spreadsheet with .xlsx format and asks that it be sent to him on a USB stick.

Preliminary inquiries indicate that, with minor tweaking of the database program, your agency is able to produce the information sought either electronically in the format requested or as a printed document (the latter would be about 5,000 pages long).

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## Victoria — form of access

The form of access requires understanding what is the ‘document’ sought by the applicant. Based on the definition of ‘document’ in s 5(1) that we saw earlier, the document in this case is likely to be the device on which the data is embodied and capable of being reproduced therefrom.

Forms of access under the Vic FOI Act are set out in s 23. Providing inspection of the ‘document’ — that is, the device — would be nonsensical. Providing a copy of the device is a practical impossibility because what is sought is information stored on the computer device — in this case, the agency’s computers.

Given that this involves consideration of information stored on computers, the precise role of s 19 is relevant before coming to a final view about the form of access. Section 19 of the Vic FOI Act deals with requests for information (that is, not documents) involving computers and other equipment. It is arguable that the request for data from the database is for information. It is also arguable that the information, which is stored on computer devices with a lot of other information of the agency, is not ‘available’ in discrete form in documents (that is, devices) of the agency.<sup>30</sup>

Assuming that to be correct, the question becomes whether the agency could produce a *written* document containing the information sought by use of computer or other equipment that is ordinarily available for retrieving or collating stored information. If the agency can produce such a written document using its computers or other equipment that is ordinarily available then it must do so, and that written document is treated as the one sought by the applicant for the purposes of the FOI Act. The computer or other equipment that is ordinarily available must be capable of functioning independently to collate or retrieve stored information and to produce the requested written document.<sup>31</sup> This can include situations where an existing program could easily be modified or where the agency routinely commissions or retains staff to produce new computer programs of the necessary kind.<sup>32</sup>

If a new computer program is required to be written so as to produce the document then a computer is not being used in a manner that is ordinarily available to the agency, because an extraordinary step is required to be taken.<sup>33</sup> It is similarly not required to do so where it would be a departure from the agency’s ordinary or usual conduct and operation.<sup>34</sup>

From our fact scenario, it appears that the agency can and is required to produce a *written* document containing the information sought. Section 19 requires that to happen for the agency to treat that written document as the document sought for the purposes of the Vic FOI Act. This has a direct impact on the form of access.

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30 This will depend on what is meant by ‘available’ and whether it equates to how it is stored: *Halliday v Corporate Affairs* (1991) 4 VAR 327; contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

31 *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCFCFA 67 [44].

32 *Proudfoot v Victoria University (No 2)* [2018] VCAT 612 [72].

33 *Collection Point Pty Ltd v Commissioner of Taxation* [2012] FCA 720 [20], [22] (Marshall J); *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCFCFA 67 [49], [52].

34 *Neilson v Secretary, Services Australia* [2020] AATA 1435 [36].

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Under s 23 we know that usually where an applicant has requested access in a particular form, access shall be given in that form.<sup>35</sup> This right is subject to s 19, which has required in our fact scenario that the agency produce a *written* document and treat that as the document sought, regardless of the request for access to a copy in Excel spreadsheet format.

We also know that the forms of access provided for in the Vic FOI Act are those in s 23 and that it has been held (albeit in another jurisdiction) that, although an applicant may request a particular *form* of access (for example, a copy), they cannot require a particular *format*; it is a matter for the discretion of the agency as to the format in which access will be provided.<sup>36</sup> For example, an applicant cannot ask for a copy on pink paper with blue ink, just as they cannot ask for a copy in .xlsx format.

Therefore, the inadequacy of the Vic FOI Act in this fact scenario is that it requires the information sought to be provided as a copy of a *written* document, which most probably means a hard copy printed document of about 5,000 pages in length, rather than providing a copy in the electronic format requested. This would probably be frustrating for the applicant, who may have sought the electronic version to be able to do further assessment or manipulation of the underlying data in the requested Excel format.

A query arises as to whether, in light of the obligation to produce the written document, the agency could nevertheless provide access in the requested format.

#### *Victoria — partial access*

The obligation to consider providing partial access only arises if all three requirements in s 25 are satisfied. In short: a decision is made that a document is exempt or contains irrelevant material; it is practicable to provide access to a copy of the document with exempt or irrelevant information ‘deleted’; and the applicant has stated in the request or subsequently indicated a wish to receive access to such an edited copy.

In this fact scenario there is an argument to say that partial access is *not* sought, but it does not appear to be an issue because the agency has indicated that it can produce the document with all of the information sought. Other issues may arise if the agency cannot produce all of the information sought or can only produce a document with more than what is sought, and the applicant has not indicated that they are willing to receive access to documents with irrelevant information deleted.

#### *Victoria — access charges*

The access charges payable will depend on the form of access provided. What is chargeable (or not chargeable) is set out under s 22 of the Vic FOI Act in conjunction with the *Freedom of Information (Access Charges) Regulations 2014* (Vic) (Access Regulations).

In this fact scenario, s 19 of the Vic FOI Act requires the production of a written document.

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<sup>35</sup> Vic FOI Act s 23(2).

<sup>36</sup> *QVFT v Secretary, Department of Immigration and Citizenship* [2011] AATA 763 [119]–[120].

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The access charges payable would include<sup>37</sup> the reasonable costs incurred by the agency in providing the written document.<sup>38</sup> At the very least, that would include the internal staff cost of the agency in producing and providing the written document.<sup>39</sup> One case has suggested that it surely must include the salaries of those involved in gathering the information and producing the document; and any included direct on-costs (such as payroll tax, superannuation, WorkCover, holiday loading, long service leave provision, and administrative and operating expenses).<sup>40</sup>

If, however, an agency ignores the technical legal position and provides a copy of the information in the format requested by the applicant, it is arguable that the charge payable would be the reasonable costs incurred by the agency in providing the copy.<sup>41</sup>

Even though a 'document' includes any article on which information has been stored electronically (which would appear to trigger similar difficulties as in the Vic FOI Act definition about the document being the device), it is important to note that a 'document' in the Cth FOI Act includes 'any other record of information'. The *FOI Guidelines* explains that this can include information held on computer servers.<sup>42</sup>

When you turn to s 17 of the Cth FOI Act — which deals with requests involving information on computers — to see how it deals with the fact scenario, it is notable that the obligation to create a written document only operates where, among other things, it does not appear from the request that the applicant wishes to be provided with a computer disk on which the information is recorded. In this scenario the applicant has expressly sought that the information be provided on a USB stick (which may fall within what would be considered as a computer disk). Therefore, s 17 is not triggered to require production of a written document.

The requested form of access in this fact scenario is a copy of the information on USB stick. Therefore, such a copy would be required to be provided in that form.<sup>43</sup>

If access was not sought by provision of information on a computer disk, s 17 would have required the agency to generate a written document containing the information sought. The same limitations, constraints and disappointments which might arise under s 19 of the Vic FOI Act would also most likely arise in that scenario.

### *Commonwealth — partial access*

Under s 22 of the Cth FOI Act, partial access to a document need only be granted with exempt or irrelevant information deleted if the following requirements are met: the agency has decided that a document is exempt or would disclose irrelevant information; it is possible and reasonably practicable to provide access to an edited copy; and there is nothing in the

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37 Subject to any exclusions arising from Vic FOI Act s 22.

38 *Freedom of Information (Access Charges) Regulations 2014* (Vic) (Access Regulations), schedule, item 7. Note that search time under item 1 is excluded where item 7 applies.

39 *Clark v Department of Justice* [2015] VCAT 1348.

40 *Mickelborough v Victoria Police* [2016] VCAT 732 [22], [27].

41 Access Regulations, schedule, item 4.

42 Office of the Australian Information Commissioner (n 21) [2.30].

43 See Cth FOI Act s 20(1) and (2).

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request or consultations with the applicant to make it apparent that the applicant would decline access to an edited copy.

This last requirement is an important difference to the Vic FOI Act, which places the onus on an applicant to indicate if they seek partial access. Under the Cth FOI Act, the onus is reversed and the agency must provide partial access unless the request or subsequent consultations suggest otherwise.

There is nothing in the request in this fact scenario to suggest that the applicant would not accept access to an edited copy.

### *Commonwealth — access charges*

Under s 29 of the Cth FOI Act, an agency may decide to impose charges in respect of request for access and/or in respect of provision of access to documents. Those charges are as set out in the *Freedom of Information (Charges) Regulations 2019* (Cth) (Charges Regulations). The *FOI Guidelines* explain that there are two types of charges payable: charges related to making a decision on a request;<sup>44</sup> and charges for giving access to the documents.<sup>45</sup>

The access charges that could be payable in this scenario are likely to be the sum of:

- a. a charge in respect of the production of the document containing the information, for an amount not exceeding the actual cost incurred by the agency in producing the document;<sup>46</sup>
- b. a charge for deciding whether to refuse or grant access or partial access at \$20 per hour if it takes more than five hours;<sup>47</sup>
- c. where information is available in a document produced for the request by using computer equipment, and deletions were required which could not be practicably done other than by using computer equipment, a charge in respect of the production by the computer or other equipment of a copy of the document with those deletions, not exceeding the actual costs incurred by the relevant agency in producing a copy of the document;<sup>48</sup>
- d. a charge for the production by an agency of a copy of a document in the form of a computer disk, for an amount not exceeding the actual costs incurred by the relevant agency in producing a copy of the document; and<sup>49</sup>

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<sup>44</sup> See *Freedom of Information (Charges) Regulations 2019* (Cth) (Charges Regulations), sch 1, pt 1.

<sup>45</sup> *Ibid* pt 2.

<sup>46</sup> *Ibid* pt 1, item 2. See also Office of the Australian Information Commissioner (n 21) [4.36].

<sup>47</sup> Charges Regulations, sch 1, pt 1, item 4. Compare to the Victorian regime which precludes access charges for most aspects of decision-making where electronically stored information is concerned (see Vic FOI Act s 22(1)(e)).

<sup>48</sup> Charges Regulations, sch 1, pt 2, item 4.

<sup>49</sup> *Ibid* item 5.

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- e. a charge for postage or delivery of the document (that is, the USB stick) to the applicant if it is requested it be posted or delivered to the applicant.<sup>50</sup>

## **Scenario 2 — emails and PDFs**

Your agency is striving to be as paperless as possible. Nothing is printed out unless absolutely necessary. Any hard copy correspondence (which is rare these days) or other documents are ‘scanned to email’ and saved as a .pdf, and then the hard copy is destroyed. Emails and any documents ‘scanned to email’ are stored electronically on Google Gmail servers overseas or on the agency’s hard drives in Australia. Your agency has a contract with Google which ensures that your agency retains legal control and rights over the data so stored; Google does not have any legal control or other rights over that information.

A disgruntled former employee, whose position was terminated during the probation period under the employment contract, makes an FOI request for a copy of all emails held by the agency which refer to him or relate to his employment or termination.

### *Victoria — form of access*

The form of access requires understanding what is the ‘document’ sought by the applicant. Based on the definition of ‘document’ in s 5(1) that we saw earlier, unless this is considered a ‘document in writing’, the document in this case is probably the device on which the data comprising the email is embodied and capable of being reproduced therefrom.

This is because emails may not be ‘documents’ in the sense defined under the Vic FOI Act but only *documents* in our everyday language. We also know from statutory interpretation principles that if a term is defined in legislation then any dictionary or ordinary meaning that may otherwise exist is notionally displaced by the act of defining the term.<sup>51</sup> Further, it is impermissible to construe a definition by reference to the term defined (and would be circular to do so).<sup>52</sup> In the present context, it is arguably impermissible to construe the defined term ‘document’ by reference to the ordinary meaning of the word ‘document’. Generally, a defined term is given a special meaning by a statute, which must be applied whether or not it accords with the ordinary meaning.<sup>53</sup>

Further, the Supreme Court has held in relation to the definition of ‘document’ in the FOI Act:

It makes it clear that where the same information appears in different forms, such as a ‘document in writing’, a ‘disc’, a ‘tape’ or a ‘device’ such as a computer server, each form of the information is a separate document. A copy of a document can be a separate document from the original. Where a request seeks access to all documents containing particular information ..., all forms in which that information appears fall within the request. However, where the request seeks access to a particular document ..., only that document falls within the request notwithstanding that the same information may appear in other documents.<sup>54</sup>

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50 Ibid item 9.

51 *Office of the Premier v Herald and Weekly Times Pty Ltd* [2013] VSCA 79 [61]. See also D Pearce and R Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8<sup>th</sup> edition, 2014) p 309, [6.59].

52 *Owners of Shin Kobe Maru v Empire Shipping Co Inc* [1994] HCA 54 [26]; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30 [3] (Gibbs J).

53 *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30 [3]

54 *University of Melbourne v McKean* [2008] VSC 325 [25] (Kyrrou J).

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Forms of access under the Vic FOI Act are set out in s 23. Providing inspection of the 'document' — that is, the device — would be nonsensical. Providing a copy of the device is a practical impossibility because what is sought is information stored on computer devices — in this case, the agency hard drives or Google's Gmail servers. Further, it is not about words being recorded but, rather, about data.

The applicant asked for a copy, but providing a copy is not possible, as you cannot give a copy of the device. We also know that, if the form of access requested would not be appropriate, having regard to the physical nature of the document, access can be refused in the form requested and given in another form.<sup>55</sup>

We also saw that the form of access in s 23, and the ability of the applicant to nominate the form of access, is subject to s 19.<sup>56</sup> Therefore, we need to consider if s 19 requires a written document to be produced.

As you may recall, s 19 deals with requests for information (not documents) involving computers and other equipment. Assuming that the request was validly (duly) made, the next question is whether the request for emails can be considered as a request for information that is not available in discrete form in documents of the agency. It is arguable that the request is for information. It is also arguable that the information, which is stored on computer devices here and/or overseas with a lot of other information of the agency and others, is not 'available' in discrete form in documents (that is, devices) of the agency. If the information sought (such as an email electronically stored) is only part of the information stored on a device, access may not be available under s 23 of the Vic FOI Act.<sup>57</sup> In particular, to the extent that the information is stored on Google Gmail servers overseas, these devices are not devices of the agency; only some of the information on them is information of the agency.

Section 19 then asks whether it is possible for the agency to produce a *written* document containing the information, in discrete form, by use of computer and other equipment that is ordinarily available to the agency for retrieving or collating stored information. It does not require that the computers or other equipment be devices of the agency. In this fact scenario, given the contractual arrangements with Google, the answer is yes. They merely need to be identified, the agency presses print, and they come out of another device — that is, the agency printer. There would be no need to obtain additional equipment or reprogram existing equipment or write a specific program to enable a database to be interrogated in order to respond to this FOI request.<sup>58</sup>

Accordingly, s 19 would probably require the agency to produce<sup>59</sup> the emails as written documents and treat those written documents as if they were the ones sought — the email information having been extracted from the 'document', which in this case is the computer

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55 Vic FOI Act s 23(3).

56 *Ibid* s 23(2).

57 This will depend on what is meant by 'available' and whether it equates to how it is stored: *Halliday v Corporate Affairs* (1991) 4 VAR 327; *contra EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

58 *Dimitrijević v Department of Education* [1998] QICmr 14 [24].

59 That is, bring into existence: *Australian Concise Oxford Dictionary* (6<sup>th</sup> edition, 2018).

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or other device. Section 19 then deems the applicant's FOI request as being a request for access to that *written document* so produced and the agency is obliged to deal with it under the Vic FOI Act as if the agency had that written document in its possession when the request was received, and as if the request was for that written document.

Once the *written document* has been prepared, only then can access be given in one of the relevant forms of access in s 23, in this case the requested copy.

### *Victoria — partial access*

The obligation to consider providing partial access only arises if all three requirements in s 25 are satisfied. In short: a decision is made that a document is exempt or contains irrelevant material; it is practicable to provide access to a copy of the document with exempt or irrelevant information 'deleted'; and the applicant has stated in the request or subsequently indicated a wish to receive access to such an edited copy.

In this fact scenario there is an argument to say that partial access is *not* sought because there is nothing to suggest that the applicant stated in the request, as required by s 25(c), a wish to receive such an edited copy. What would happen if partial access was sought? What other issues could arise?

If s 19 operates as above then no issue arises, because once the written copy of the emails is printed it can be edited to remove any exempt or irrelevant information, if practicable.

However, what happens if s 19 does not operate to require a written document to be created? This might be the case, for example, if it is considered that the electronically stored emails are already documents 'in writing' and there is no need to resort to that part of the definition of 'document' that steers you to the device storing the information as the document. On this argument, the electronically stored emails are already information that is available in discrete form in documents of the agency. But available for what? You might be able to provide access to the complete emails by making arrangements for them to be viewed, but how do you provide partial access to something which is only viewed on a screen? How do you provide a copy? Is the Vic FOI Act sophisticated enough to cope with this using the current language in the Act?

### *Victoria — access charges*

The access charges payable will depend on the form of access provided. What is chargeable (or not chargeable) is set out under s 22 of the Vic FOI Act in conjunction with the Access Regulations. Note that s 22(1)(h) provides that, even if the request is for access to a document containing information relating to the personal affairs of the applicant, an agency can still impose a charge for the reasonable costs incurred by the agency in making a written document in accordance with s 19.

Therefore, if an agency sticks to the strict legal position of relying on s 19 to produce written documents, the charges arguably payable would include<sup>60</sup> the reasonable costs incurred

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<sup>60</sup> Subject to any exclusions arising from the Vic FOI Act s 22.



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by the agency in providing the written document.<sup>61</sup> At the very least, this would be the internal staff cost of the agency in producing and providing the written document.<sup>62</sup> One case has suggested that it surely must include the salaries of those involved in gathering the information and producing the document; and any included direct oncosts (such as payroll tax, superannuation, WorkCover, holiday loading, long service leave provision, and administrative and operating expenses).<sup>63</sup>

If access is provided other than because of the operation of s 19, the access charges will depend on how access was provided and an appropriate charge would need to be calculated in accordance with the schedule to the Access Regulations.

### *Commonwealth — form of access*

Even though a 'document' includes any article on which information has been stored electronically (which would appear to trigger similar difficulties as in the Vic FOI Act definition about the document being the device), it is important to note that a 'document' in the Cth FOI Act includes 'any other record of information'. The *FOI Guidelines* explains that this can include information held on computer servers<sup>64</sup> and that the reference in s 17 of the Cth FOI Act to information recorded on a computer tape or disk should be taken to include information recorded in an email or on electronic storage media.<sup>65</sup>

Under s 17 of the Cth FOI Act, in this scenario it is arguable that the information in the emails is not available in discrete form in written documents of the agency, that no request was made to include the emails on a computer disk, and presumably that a written document containing the information sought can be made using the computer equipment ordinarily available to the agency for storing or collating information (by pressing print).<sup>66</sup>

In such circumstances, it would appear that the agency would be required to generate the written documents and deal with them as if they were the documents in its possession that were sought by the request. As the applicant sought a copy, access to a copy must be provided.<sup>67</sup>

### *Commonwealth — partial access*

There is nothing in the requests to suggest that the applicant would not wish to have access to edited copies of documents, with exempt or irrelevant matter deleted. Accordingly, partial access does not appear to give rise to any difficulties in this fact scenario, should any of the information in the subject emails turn out to be exempt or irrelevant.

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61 Access Regulations, schedule, item 7. Note that search time under item 1 is excluded where item 7 applies. But compare with s 22(1)(h) where it is about information of the applicant — is this different to the reasonable costs incurred in making the written document?

62 *Clark v Department of Justice* [2015] VCAT 1348. But contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

63 *Mickelborough v Victoria Police* [2016] VCAT 732 [22], [27].

64 Office of the Australian Information Commissioner (n 21) [2.30].

65 *Ibid* [3.205].

66 Assuming this is able to be done without substantially and unreasonably diverting the agency's resources.

67 Unless one of the exceptions in s 20(3) applied or s 22 applied to not require partial access be given (if any part of the emails was irrelevant or comprised exempt matter).

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### *Commonwealth — access charges*

Some of the conundrums under the Vic FOI Act in relation to access charges in this scenario do not arise under the Cth FOI Act. This is because s 7(1) of the Charges Regulations makes it clear that there is no charge in respect of provision of access to a document that contains personal information of the applicant.

### **Scenario 3 — CCTV footage**

The agency has a series of CCTV cameras outside and within its offices, including at the front entrance of the offices. The cameras are constantly recording and the recorded footage is stored on computers of the agency. The footage includes date and time stamps and is stored on local hard drives in a server of the agency for about three months before it is uploaded to cloud storage.

The FOI applicant is an individual who has been arrested for a serious offence which allegedly occurred three weeks ago. She claims that she is innocent and is trying to establish an alibi that she was at your agency at about the time the offence was allegedly committed. Through her lawyer, she lodges a validly made FOI request which requests a copy of the complete CCTV footage taken continuously and without any breaks or deletions, over a two-hour period on the relevant date, from the camera placed at the front entrance of your offices. She hopes it will show when she arrived and when she left, as conclusive proof that she could not have committed the offence for which she has been charged.

### *Victoria — form of access*

The form of access requires understanding what is the 'document' sought by the applicant. Based on the definition of 'document' in s 5(1) that we saw earlier, the document in this case is the device on which visual images are embodied and capable of being reproduced therefrom.

Forms of access under the Vic FOI Act are set out in s 23. Providing inspection of the 'document' — that is, the device — would be nonsensical. Providing a copy of the device is a practical impossibility because what is sought is information stored on the computer device — in this case, the server. Further, it is not about words being recorded but, rather, about images.

The solution appears to be in s 23(1)(c) of Vic FOI Act which provides that access may be given 'in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images'.

We also know that usually, where an applicant has requested access in a particular form, access shall be given in that form.<sup>68</sup> This right is subject to ss 19, 25 and the remainder of s 23. Here, the applicant asked for a copy. But providing a copy is not possible as you cannot give a copy of the device. We also know that if the form of access requested would not be

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<sup>68</sup> Vic FOI Act s 23(2).

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appropriate, having regard to the physical nature of the document, access can be refused in the form requested and given in another form.<sup>69</sup>

Therefore, on a present reading of the Vic FOI Act the applicant should arguably never be able to obtain a *copy* of CCTV footage sought but, rather, would have to settle for being able to view the visual images. This is not a satisfactory state of affairs.

Numerous Victorian Civil and Administrative Tribunal (VCAT) cases about CCTV footage have failed to undertake this analysis and appear to just assume that the footage sought can be extracted and put onto a device, like a USB stick, and given to the applicant (subject to exemptions and other considerations about partial access). But there may be no legal basis for doing so.

Another aspect of difficulty is the operation of s 19 of the Vic FOI Act, which deals with requests for information (not documents) involving computers and other equipment. It is arguable that the request is for information. It is also arguable that the information, which is stored on computer devices with a lot of other information of the agency, is not 'available' in discrete form in documents (that is, devices) of the agency.<sup>70</sup> The problem, however, is that the agency cannot produce a *written* document containing the information sought by use of computer or other equipment that is ordinarily available for retrieving or collating stored information. How do you create a written document for moving images in CCTV footage electronically stored?

Part of this problem could be alleviated if the reference to 'written' document was removed, such that the agency is able to produce a document (that is, a device such as a USB stick) containing the information sought by using its ordinarily available computer or other equipment.

### *Victoria — partial access*

The obligation to consider providing partial access only arises if all three requirements in s 25 are satisfied. In short: a decision is made that a document is exempt or contains irrelevant material; it is practicable to provide access to a copy of the document with exempt or irrelevant information 'deleted'; and the applicant has stated in the request or subsequently indicated a wish to receive access to such an edited copy.

In this fact scenario there is an argument to say that partial access is *not* sought because of the references to complete footage taken continuously and without any breaks or deletions.<sup>71</sup> Therefore, it need not be contemplated in determining questions about access. What would happen if partial access *was* sought? What other issues could arise?

An issue under the Vic FOI Act is the inconsistency which exists in decided VCAT cases on whether, in providing partial access — for example, because CCTV footage might

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69 *Ibid* s 23(3).

70 This will depend on what is meant by 'available' and whether it equates to how it is stored: *Halliday v Corporate Affairs* (1991) 4 VAR 327; contra *EBT v Monash University* [2020] VCAT 440 — at the time of writing a decision of the Supreme Court of Victoria brought by the university appealing this VCAT decision is pending.

71 *Parker v Court Services Victoria* [2021] VCAT 461; *AQ5 and Court Services Victoria* [2019] VICmr 149.

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unreasonably disclose information relating to the personal affairs of individuals in the footage<sup>72</sup> — pixilation can be applied. On one hand, there are cases which expressly address the question and make it clear that pixilation is not the same as deletion (which is what s 25 anticipates) and that s 25 does not mandate pixilation.<sup>73</sup> Yet there are other cases which, unfortunately, do not (obviously) turn their mind to the question and just assume that pixilation is okay for the purposes of providing partial access under s 25 of the Vic FOI Act.<sup>74</sup>

Whether it is deletion or pixilation that is being contemplated, issues can arise as to whether granting partial access to CCTV footage is practicable. This can depend on factors such as whether:

- a. what would result is no longer meaningful or of any assistance to an applicant;<sup>75</sup>
- b. the necessary process would divert an agency from its more urgent core work; and<sup>76</sup>
- c. even though the pixilation or deletion of footage would be possible, the estimated cost would place to great a burden on the taxpayer.<sup>77</sup>

### *Victoria — access charges*

The access charges payable will depend on the form of access provided. What is chargeable (or not chargeable) is set out under s 22 of the Vic FOI Act in conjunction with the Access Regulations.

If an agency sticks to the strict legal position of only granting access by way of making arrangements to view visual images, the charges payable would include:<sup>78</sup>

- a. routine search time at 1.5 fee units per hour or part of an hour;<sup>79</sup>
- b. a charge for supervision of viewing the visual images of 1.5 fee units per hour (calculated per quarter hour or part of a quarter hour); and<sup>80</sup>

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72 Vic FOI Act s 33(1).

73 *Rogers v Chief Commissioner of Police* [2009] VCAT 2526 [56]; *Lonigro v Victoria Police* [2013] VCAT 1003 [57].

74 See eg *Willner v City of Port Phillip* [2015] VCAT 1320; *Willner v Department of Economic Development, Jobs, Transport and Resources* [2015] VCAT 669; *BL3 and Victoria Police* [2020] VICmr 109; *AT5 and Victoria Police* [2019] VICmr 177; *AD1 and Department of Education* [2019] VICmr 28.

75 *Brygel v Victoria Police* [2014] VCAT 119 [59]; *Lonigro v Victoria Police* [2014] VCAT 1003 [57]; *AD1 and Department of Education* [2019] VICmr 28; *AJ3 and The Royal Children's Hospital* [2019] VICmr 84.

76 *Brygel v Victoria Police* [2014] VCAT 1199 at [59]; *Lonigro v Victoria Police* [2014] VCAT 1003 [58]; *Willner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 [35].

77 *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [72], [77]; *Willner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 [39]. By contrast, the Information Commissioner has suggested that the fact that an agency does not have the technical capability to pixelate footage is not sufficient justification alone to deem it impracticable from a resources point of view to create an edited version where there are commercially available programs available for minimal cost to enable an agency to redact or edit CCTV footage: *AJ4 and Victorian WorkCover Authority* [2019] VICmr 85.

78 Subject to any exclusions arising from the Vic FOI Act s 22.

79 Access Regulations, schedule, item 1. Note that from 1 July 2021 a fee unit is \$15.03.

80 *Ibid* item 2. Note that from 1 July 2021 a fee unit is \$15.03.

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- c. the reasonable costs incurred by the agency in making arrangements for the applicant to view the visual images.<sup>81</sup>

Of course, the position will be different if a copy of extracted CCTV footage is being given (contrary to the strict legal position). Access charges payable in that situation would include:<sup>82</sup>

- a. routine search time at 1.5 fee units per hour or part of an hour; and<sup>83</sup>
- b. the reasonable costs incurred by the agency in providing other than a black and white photocopy.<sup>84</sup>

### *Commonwealth — form of access*

Looking first to determine what is the ‘document’, defined in the Cth FOI Act, that is being dealt with in this fact scenario, an issue arises because it could be any or all of:

- a. any article from which images are capable of being reproduced;
- b. any article on which information has been stored or recorded electronically; and
- c. any other record of information.

Interestingly, the *FOI Guidelines* tends to gloss over the reference to an ‘article’ but focuses instead on the collection of information — in this case, the CCTV footage which has been recorded on a device. They expressly provide that the definition of ‘document’ includes ‘video footage’ and ‘information stored on computer tapes, disks, DVDs and portable hard drives and devices’ and information held on computer servers.<sup>85</sup> It is probably logically easier to deal with the record of information as being the ‘document’ rather than the device. Given that the CCTV footage is stored on the agency’s computer servers, consideration will need to be given to whether s 17 of the Cth FOI Act applies. Assuming that the request is valid, the information sought is not available in discrete form in *written* documents of the agency, and the request does not expressly request the information on a computer disk, it is fair to conclude that the agency cannot produce a written document containing the CCTV footage on it. Therefore, s 17 does not apply. There is no written document required to be generated to which the applicant could be given a copy. But does that preclude some other copy being provided?

Section 20 of the Cth FOI Act, setting out the forms of access contemplated by the Act, specifically includes a form of access to address the situation where the ‘document’ is the article from which visual images are capable of being produced. It provides that access can be by making arrangements for the applicant to view the visual images. But that would not satisfy the applicant’s request to have a copy.

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81 Ibid item 5.

82 Subject to any exclusions arising from the Vic FOI Act s 22.

83 Access Regulations, schedule, item 1. Note that from 1 July 2021 a fee unit is \$15.03.

84 Ibid item 4.

85 Office of the Information Commissioner (s 21) [2.29].

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If, however, we focus on the possibility that the ‘document’ is the CCTV footage, being any other recorded information, perhaps the provisions are broad enough to facilitate a copy being provided. There is nothing to suggest that providing a copy cannot be done by extracting that information and providing it separately on a computer disc or other storage device (such as a USB stick). It is still, arguably, providing a copy of ‘the document’ — namely, the collection of other information recorded which was sought — the particular CCTV footage.

This approach would be supported if s 17 were amended to delete the second reference to ‘written’ and require the production of a ‘document’ containing the information sought, not a ‘written document’ containing the information.

So, the outcome with respect to form of access is clearly affected by what is considered to be the ‘document’ when it comes to considering CCTV footage electronically stored.

### *Commonwealth — partial access*

Where CCTV footage might give rise to issues about exempt or irrelevant information being contained within it, the question of partial access comes up for consideration. In this fact scenario it is arguable that the strong words of the request might give rise to a conclusion under s 22(1)(d) of the Cth FOI Act that it is apparent from the request that the applicant *would* decline access to an edited copy, modified by deletion of exempt or irrelevant material. If in doubt, it is always best to ask the applicant — there can be subsequent consultations with the applicant in which the wishes of the applicant can be clarified.

If the applicant did subsequently indicate a wish to receive partial access with deletions from the CCTV footage, it is important to note a position taken under the Cth FOI Act on pixilation, which is different to that in Victoria. The Acting Australian Information Commissioner has previously concluded that pixilation, blurring or blacking out of information from a copy of CCTV footage ‘is a deletion of part of a moving image within the ordinary meaning of the word, provided the [exempt] information is removed’.<sup>86</sup> He disagreed with the Victorian FOI cases put to him on the basis that the personal information exemption was sufficiently different in each jurisdiction.

Only the least amount of pixilation should be done — that is, ‘apply the least possible redaction that would make the document non-exempt’ so that access to the edited copy would be required to be given.<sup>87</sup>

### *Commonwealth — access charges*

The access charges payable if access is given to the CCTV footage on a USB stick can be quite confusing and could include the sum of:

- a. a charge in respect of the production of the document containing the information, for an amount not exceeding the actual cost incurred by the agency in producing the document;<sup>88</sup>

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86 *Healy and Australia Post* [2016] AICmr 23 [37], [39]. See also *Whish-Wilson v Australian Fisheries Management Authority* [2016] AICmr 29; *Bissett and Department of Human Services* [2015] AICmr 10.

87 *Bissett and Department of Human Services* [2015] AICmr 10 [33].

88 Charges Regulations, sch 1, pt 1, item 2. See also Office of the Information Commissioner (n 21) [4.36].

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- b. a charge for deciding whether to refuse or grant access or partial access at \$20 per hour if it takes more than five hours;<sup>89</sup>
  - c. where access is for a document which is an article or thing from which visual images are capable of being produced, and access is given to a copy, a charge for the production of a copy, for an amount not exceeding the actual costs incurred by the relevant agency in producing the copy;<sup>90</sup>
  - d. a charge for the production by an agency of a copy of a document in the form of a computer disk, for an amount not exceeding the actual costs incurred by the relevant agency in producing a copy of the document; and<sup>91</sup>
  - e. a charge for postage or delivery of the document (that is, the disk) to the applicant if it is requested it be posted or delivered to the applicant.<sup>92</sup>

However, if access is given by way of arranging a viewing of the visual images, the charges that could be payable are likely to be the sum of:

- a. a charge for deciding whether to refuse or grant access or partial access at \$20 per hour if it takes more than five hours;<sup>93</sup>
- b. where information is available in a document produced for the request, by using computer equipment, and deletions were required which could not be practicably done other than by using computer equipment, a charge in respect of the production by the computer or other equipment of a copy of the document with those deletions, not exceeding the actual costs incurred by the relevant agency in producing a copy of the document;<sup>94</sup>
- c. when making arrangements for viewing under supervision, the cost of supervision by an officer at \$6.25 for the first half hour (or less) and \$6.25 per every half hour or part of a half hour after the first half hour; and<sup>95</sup>
- d. charges in respect of any other arrangements for the viewing of the visual images (apart from supervision of the viewing) at an amount not exceeding the actual costs incurred by the relevant agency in respect of the arrangements.<sup>96</sup>

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89 Charges Regulations, sch 1, pt 1, item 4. Compare to the Victorian regime, which precludes access charges for most aspects of decision-making where electronically stored information is concerned (see Vic FOI Act s 22(1)(e)).

90 Charges Regulations, sch 1, pt 2, item 7.

91 Ibid item 5.

92 Ibid item 9.

93 Ibid item 4. Compare to the Victorian regime, which precludes access charges for most aspects of decision-making where electronically stored information is concerned (see Vic FOI Act s 22(1)(e)).

94 Charges Regulations, sch 1, pt 2, item 4.

95 Ibid item 1.

96 Ibid item 6.

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## Concluding comments

From the above it is possible to draw a few conclusions:

1. The ability of the FOI legislation to cope with access to electronically stored information may depend on what the Act defines as a 'document' — does it anticipate that it can be any recorded information or is it fixated on archaic notions of the device storing the information?
2. As technology has developed, is there still a need for there to be a distinction between a 'written' document and a document 'in writing'; and can electronically stored information be a 'written' document or a document 'in writing'?
3. Where the document sought is an article or device which stores information, there may be resultant limitations and inconsistencies in the form of access that can legally be provided under an FOI Act, depending on which Act is being referred to.
4. The potential for more than one form of access to be provided under an FOI Act from the same set of circumstances or different sets of circumstances, and the lack of certainty as to how an agency should treat electronically stored information, can give rise to confusion and inconsistent results between and within agencies.
5. Where access is available by way of inspection, it may give rise to technological issues about granting partial access. The different presumptions as to whether partial access must be contemplated or not can be frustrating and confusing, particularly for frequent users of FOI legislation around the country.
6. Access charges that may be payable for electronically stored information can vary dramatically depending on what is treated as the document sought, what form of access is sought, and whether the form of access sought can be provided.
7. There is definitely uncertainty and lack of clarity as to what access charges are payable for the provision of access to electronically stored information.

Although it may be a bit dramatic and premature to say that technology is killing FOI, it is definitely making it more difficult to deal with requests for access to electronically stored information where the emphasis in the legislation is on 'documents'.

It is probably high time that Australian jurisdictions review their legislation to make obligations associated with requests for access to electronically stored information easier for agencies to understand and facilitate. This is not a new concept.

In Victoria, at least, it is interesting that there have been VCAT decisions which have highlighted that, when it comes to dealing with electronically stored information, responding to FOI requests can be problematic, little explored, and the 'Victorian Government may wish to consider whether clarification by legislative amendment is desirable'.<sup>97</sup>

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<sup>97</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 521 [29]; *EBT v Monash University* [2020] VCAT 440 [51].