

Slovenliness is now a valid excuse

June 28, 2008 — 10.00am

This was published 12 years ago

The state's highest court has delivered another blow to anyone trying to get information using NSW's freedom of information laws.

As of last week, whenever a government agency says it cannot find a document, bad luck. There's nothing you can do about it - even if you know it has the document.

The unanimous decision by a full bench is just the latest instance of how the NSW law is being quietly chloroformed by a government and its legal staff.

Here is what's happened.

In September 2003 an obsessive orchardist named Robert Cianfrano tried to find out how the Government came to sell Flemington Markets to a private company called Sydney Markets Limited.

The Italian fruit grower from Orange submitted Fol requests to the Department of Commerce and the Department of Public Works and Services. They gave him access to 1241 documents and refused access to another 1066. Cianfrano appealed to the Administrative Decisions Tribunal.

In the complicated legal fight that ensued, an issue emerged about documents Cianfrano believed existed but the department claimed it could not find.

The tribunal believed it had the power to tell government departments to have another look. But the NSW Government said no. It argued that, if an

agency said it could not find a document, it was not refusing access and, therefore, had not made a decision. With no decision, there could be no appeal.

It's a fine legal point, but the tribunal and the NSW Crown Solicitor, representing the Department of Commerce, took their fight all the way to the Court of Appeal.

Legal experts say it is a good decision at law. But the effects are anything but good.

Now, when an agency gets an Fol request it can simply pretend it cannot find the relevant documents.

Before last week's decision, the applicant could go to the tribunal, point out documents were missing and argue the agency had not done a sufficient search. If the tribunal agreed, it could use its authority to order the agency to have another look and then make findings on what it did or did not find.

That option has now gone. If an agency now "forgets" to list some documents, or cannot find them, there are only two options. Both are hopeless.

If you are rich, you can go straight to the Supreme Court and ask it to order the agency to look again. The judges conceded this approach has problems including the cost, which it said "may be a substantial hurdle".

Option two is go to the Ombudsman. If you are lucky and the Ombudsman investigates and finds the agency has not done a proper search, he can recommend it look again. That's it. And as we have seen repeatedly in NSW, agencies routinely ignore the Ombudsman as he has no power to enforce his decisions.

The tribunal's president, Judge Kevin O'Connor, said before the decision it

was a "perversity" to stop his body scrutinising departmental claims not to have documents.

The Appeal Court judges agreed it's an unsatisfactory but said the law is clear.

NSW is now out of step with other states and Canberra. The only solution is to amend the law. But the Labor Government has refused to do that for 12 years.

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