

# Freedom of Information

# Review

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**Editor:** Rick Snell  
tel 03 62 26 2062 fax 03 62 26 7623  
email: R.Snell@utas.edu.au  
Web site: <http://www.comlaw.utas.edu.au/law/foi/>

### Reporters

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## Comment

An editor's dream. Two interesting and complementary articles completed ahead of schedule and a bank of articles for the next two to three issues being polished, updated and improved by their authors as they wait for their final deadlines. For the first time since I took on the editor's mantle, originally shared with Paul Villanti, I now have the rare opportunity, and breathing space, to think strategically about the role, content and future of the *FoI Review*. As I approach my 50th issue as editor, and the centenary *FoI Review* issue is now on the distant horizon, it is pleasing to see the interest in access to information issues is probably as strong as it was with the first issue.

However, I would like to ensure that the supply of material keeps on coming. Over the last few years the coverage of the *FoI Review* has strengthened outside its original focus on Victoria and the Commonwealth. There is now a greater coverage of developments elsewhere in the world and a greater focus on compliance, design and administration issues. I am still concerned that the pioneering and extensive work of the Information Commissioners especially in Queensland, and to a lesser extent in Western Australia, have not received enough treatment and analysis in the *FoI Review*. The paradox is that the jurisdictions from which I expected the most interest from academics and other information experts — Western Australia and Queensland — have been the quietest in terms of contributions of articles and analysis. I am also concerned that, since the Australian Law Reform and Administrative Review Council Review several years ago, interest in the Commonwealth handling of FoI has diminished.

Other gaps in coverage still surprise me especially the serious lack of attention that Freedom of Information receives from non-legal academics and the absence of comparative studies. One of my great pleasures in editing this issue has been the stimulation gained from reading Greg Terrill's article. Greg has demonstrated the understanding we can gain when different perspectives and disciplines are applied to freedom of information. In particular his analysis outlines the necessity to take a broader policy approach to the accessibility of government information. I would love to see more articles looking at access issues from philosophical, political science, historical or policy dimensions. Simon Kearney's personal account, of his working experience as a journalist, may very well revolutionise the way the Fourth Estate thinks about how FoI should be used as a journalistic tool. Peter Wilmshurst has provided the foundation for our understanding of the early jurisprudence and coverage of the ADT as it transforms the external review of FoI in NSW.

When my 50th milestone as an editor is reached, in the next few issues, I would love to be in the position where my biggest dilemma is explaining to an article contributor that the earliest their article can be published is four issues hence. So former contributors, and wannabe contributors, make my dream.

**Rick Snell**

PS: Dear Commonwealth Attorney-General, an article from you outlining how you are going to implement the majority of the ALRC/ARC recommendations would be allowed to jump the queue.

# Individualism and freedom of information legislation

## Introduction

Freedom of information (Fol) legislation has the potential to democratise secrecy. It offers individual citizens a personal means of access to otherwise secret official information, a characteristic that is universally seen as a key strength of the Act. Seldom remarked on, however, is the fact that individualism also creates significant limitations on the effectiveness of the legislation. This article identifies the strengths that arise from this individualised basis of Fol, and proposes approaches to minimise their becoming weaknesses. The focus is on the Australian federal government.

Fol provides for direct individual access to government information; it promises to create an individualised form of government accountability. Administrators become subject to a form of accountability to individual members of the public, in addition to their ongoing accountability to ministers and to parliament. In this respect, Fol is distinct from other parts of the so-called new administrative law. Judicial review, administrative appeals and ombudsmen all place a legal or quasi-legal intermediary between governments and individual citizens, with functions that include filtering the flow of official information to citizens.<sup>1</sup>

The provisions for direct citizen access have been a boon to Fol through more than just the advancement of legal principles. They have provided a firm basis for media and public interest. Issues that affect citizens directly are attractive raw material for media attention. The capacity to sustain media interest has understandably been a factor in the longevity and success of federal Fol in Australia.

In practice also, individual access has proven to offer benefits. Some of these have been rather unexpected. Early in the life of Fol, Commonwealth government agencies were asked about the effects of the legislation. The Department of Social Security reported a drop in the number of appeals from decisions on benefits, and concluded that Fol had enabled the public to better research and understand the rationale behind decisions. The Department of Trade noted similar improvements in the preparedness of job applicants.<sup>2</sup> These sorts of benefits are not specific to Fol, but should arise from any system of openness. Fol has, however, proven a useful channel to provide this sort of routinised access to information.

## The philosophical appeal

Perhaps most importantly, the individualised basis of Fol has exerted a potent philosophic appeal. A means for direct citizen interaction with government had a particular appeal at a time when, in the late 1960s, traditional parliamentary and legal means of solving disputes were widely seen to be faltering. It was no accident that Fol was taken up in Australia during this period. Had the times suited, Fol could have been adopted earlier in Australia — legislation of similar import had existed in America since 1949, and specific Fol legislation was passed in the USA in 1966.<sup>3</sup>

This philosophic origin of Fol has not gone unnoticed — indeed, it has fed perhaps the strongest and most enduring strand of criticism of Fol. The relationship between Canberra's Westminster system and Fol has been at the centre of debates about Fol since its

introduction. These debates have been not simply for and against secrecy; they have also been debates about how openness should be managed — whether through parliamentary or legal institutions, or through a direct relationship between the administration and citizens. In the change from the provision of information via intermediaries, to direct citizen access, can be seen an aspect of Australia's change from British to American models of government.

## Individual access — a strategic weakness

Fol is built on faith in the individual, as is appropriate in a democracy. But it does not thereby follow that the realisation of rights to know must be left solely to the sum of atomised actions by unconnected individuals. Collective arrangements also have a role. Any system for the management of secrecy that relies solely on means for individual access alone neglects the realities of how secrecy is promoted and perpetuated. This realisation is the key to improving the effectiveness of Fol.

Fol typically involves applications by unconnected individuals who frequently possess little knowledge of the process, and government departments that have the advantage of familiarity with the system and contact with similar players.<sup>4</sup> Collective action by those seeking information is possible, but rarely occurs. The individualism of Fol is confined to applicants; individualism is not a characteristic of government assessors.

## Structural advantage for governments

The structure of Fol is thus not formally neutral, but creates positions of relative advantage and disadvantage. Governments have the advantage of institutional memory, specialised expertise, and have a longer term interest in influencing the evolution of case law. Governments may, for example, make a strategic decision to oppose a relatively harmless application if they judge that success in this area might create an unwelcome precedent. There are few opportunities for individuals to engage with the system in ways that might equalise this unbalanced configuration of power.

The design of the legislation creates the space for government to engage in passive or even active resistance. The federal Ombudsman reported in 1995 that 'many government agencies still do not operate within the legal framework and certainly not the spirit of the Freedom of Information Act'.<sup>5</sup> In part this is a manifestation of the long-evident opposition by the administration to Fol, but it is an attitude that finds reinforcement in the wider environment. In the latter 1980s the focus of government shifted from expanding citizens' rights, to achieving policy and program — and Fol came increasingly to be viewed as an impediment to governing. In this environment, there are few checks on the inherent potential for government to dominate in a system that relies on it being trusted. Needless to say, no such possibilities of domination are available to applicants for information.

## Redressing the structural imbalance

These structural issues are inherent to Fol, and while they probably cannot be overcome, they may be ameliorated. In inquiries into Fol, the emphasis of those who would improve the effectiveness of the Act has been on

making the individualised system work. Reformers advocate less restrictive exemptions, lower fees, shorter time periods for responses, and so forth. Another approach would focus on reducing the atomisation of applicants and results. Reforms that might achieve this end include:

- encouraging repeat players;
- providing collective knowledge to individual applicants;
- promoting long-term advocates for progressive change within the system;
- making the results of one application available to all.

#### *Encouraging repeat players*

Successful applications are critical to creating a nucleus of repeat players with a stake in the system. In America, FoI is commonly used to seek commercial information by other businesses. As these outcomes are often successful, a mass of repeat and skilled users has been created.<sup>6</sup> In Australia, there are greater restrictions on the release of third party information, and these restrictions discourage this sort of application. Nor is the sort of information that is most readily gained under Australian FoI conducive to repeat requests. Most applications are for personal files, but individuals can seek to view their files only so often. Repeat players might access material of more general interest, for example policy-related information. Such repeat players need to be encouraged in Australia, as they can engage in strategic action to pursue longer term goals, lobbying for legal amendment and shaping the evolution of case law.

#### *Providing collective knowledge to individual applicants*

Public interest bodies such as community legal centres can play a central role in providing collective wisdom to otherwise isolated applicants. They are able to perform the function that lawyers do within the legal system more broadly, and do so for free or at a cost appropriate to the nature of most FoI requests. There is some of this activity underway — the Communications Law Centre, for example, has expert staff who can provide advice to applicants, and they have participated in the publication of guides to FoI Acts in Australia.<sup>7</sup> As is often the case with community bodies, which are frequently underfunded, their good work occurs all too seldom. But the potential contribution of such intermediaries is considerable.

#### *Promoting long-term advocates for progressive change within the system*

In addition to providing case-specific support, public interest organisations and community legal centres have lobbied for legislative change. In general, however, inquiries have been used as the vehicle to progress possible legislative change. These inquiries have characteristically resulted in positive reports on FoI, although their findings have routinely been freely interpreted by governments. But there is a difference between an ad hoc inquiry and an ongoing strategic interest in shaping the future of the legislation — such as can be provided, for example, by an information commissioner or other dedicated and adequately-funded advocate with a charter to maintain an interest in the health of the legislation.<sup>8</sup> It is possible — and desirable — to create advocates for applicants within the system, as examples of FoI legislation in other jurisdictions attest.<sup>9</sup>

#### *Making the results of one application available to all*

FoI provides a valuable means for individuals to find out about their personal files; this has for some time been its most used function. But success by one applicant does not necessarily increase access to like material for all, even where the material in question is factual or policy information. In general, the results of individual applications are not made available to an audience beyond the applicant. Precedent is not established — the success of one request does not provide for access to all similar classes of document. Nor does a successful request provide generalised access to similar documents that may have been created previously or may be created in the future. It may even be the case that one applicant's success will not be replicated by another, given the somewhat inconsistent decision making that often takes place. Given that, as access under FoI is granted irrespective of an applicant's standing, there need be no reason why access by one could not automatically translate to access to all. The results of successful FoI applications should be made generally and readily available. FoI should, in effect, transform the status of documents that have been accessed to make them generally available, comparable to archival documents after the commencement of the open period.

#### **A broader policy approach**

The effectiveness of FoI can also be increased by attention to the larger context within which FoI operates. FoI is only one part of a broader policy approach to the accessibility of government information. It alone does not provide a comprehensive answer to secrecy and access. Redesign of broader access policies could contribute to making FoI more useful, and mitigate some of the limitations stemming from a design that emphasises individualised application procedures. Release currently occurs for most records after the period of 30 years. A more encouraging release policy might see the generality of records released 5–10 years after their creation. This would reduce the need to rely on FoI as an access mechanism, thereby minimising an individualised system of access in favour of one that achieves automatic, consistent and generally applicable outcomes. Within this sort of regime, there would still remain a role for an individualised release mechanism such as FoI, to accommodate the inevitable exceptions contained within a complex system.

#### **Conclusion**

Collective action by FoI applicants is difficult to organise and currently largely precluded, and applications are generally conceived and made by disconnected individuals. FoI does not currently function as a mechanism for the redistribution of information, as it does not systematically alter the availability of information. Rather, its present architecture and application is atomised and individualised, both for applicants and for documents. Wholesale change to this structure is likely to be difficult to achieve within a political system that celebrates individualism while finding that same individualism a convenient strategy to limit openness, and that facilitates access by powerful conglomerations to inside government information through lobbying and other means while restricting the rights to know of individuals. But a series of modest reforms could be made that would overcome some of the limitations of the individualised architecture. Democracy is a process with collective as well as

individual dimensions, and this needs to be recognised in the procedures that apply to Fol.

### GREG TERRILL

*Greg Terrill, author of Secrecy and Openness — from Menzies to Whitlam and Beyond, Melbourne University Press, 2000, and coeditor Open Government — Freedom of Information and Privacy, Macmillan UK, 1998.*

This article benefited considerably from the encouragement of Rick Snell and comments by an anonymous reviewer.

### References

- 1 The *Administrative Appeals Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) interpose tribunals and courts respectively, and the *Ombudsman Act 1976* (Cth) creates a new institution, the Ombudsman.
- 2 Commonwealth Attorney-General's Department *Fol Annual Report 1982-3*, pp.137-9.
- 3 For history, see Terrill, Greg, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond*, Melbourne Uni-

versity Press, 2000, ch 7; 1949 Act: section 3 of the US *Administrative Procedures Act 1949*.

- 4 Galanter, Marc, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', (1974) 9 *Law and Society* 95-164.
- 5 Commonwealth Ombudsman, *Annual Report 1994-5*, AGPS, 1995, p.33.
- 6 See, eg, *Report of the Commission on Protecting and Reducing Government Secrecy*, Senate Document 105-2, 103rd Congress, United States Government Printing Office, Washington, 1997 (Chairman Daniel Patrick Moynihan).
- 7 eg Harrison Kate and Cossins Anne, *Documents, Dossiers and the Inside Dope — A Practical Guide to Freedom of Information Law*, Allen and Unwin, 1993.
- 8 For a time this function was performed within the federal government by the Information Access Unit of the Commonwealth Attorney-General's Department. However it has progressively lost resources and withdrawn from active promotion of the objects of the Act.
- 9 Information Commissioners, which perform this function, exist in both Queensland and federally in Canada — see <http://www.sq.qld.gov.au/infocomm/> and R. P. Gillis 'Freedom of Information and Open Government in Canada', in Andrew McDonald and Greg Terrill (eds) *Open Government — Freedom of Information and Privacy*, Macmillan, 1998, ch 8.

## The Media and Fol — working the sources

After the shock of receiving almost exactly what I had asked for subsided, I began wondering what I had done right. This was last year and my Fol request with Queensland Police for strip search data had come through showing 17,000 strip searches without rhyme or reason across different districts, including 5000 strip searches of people detained but never charged with an offence. It was a big story in Queensland and helped — along with some individual complaints — spark a Criminal Justice Commission inquiry into police search practices.

What I discovered was that — with a bit of patience and understanding of the work of Fol officers — searching for information can be a lot more successful than it might be otherwise. Initially we had asked for some data relating to specific districts and received that a month later. On figuring out we could request the same for the whole State we held off writing a story while we did just that. Some liaison with a helpful and professional chap called Brian Lovi in the Queensland police Fol unit modified the request a little to help me achieve what I wanted within the constraints of what they could give me. This essentially meant saving me from getting bogged down in lengthy notification, appeal and approval processes. What happened, though I was not conscious of it at the time, was I began working with Brian like I would any other source in a friendly two-way manner. I repeated this with other Fol officers only to achieve more success. In the process we discovered the Prime Minister doesn't keep any beer at home in Kirribilli or The Lodge, that Townsville has the worst learner drivers in Queensland and that one in five murderers in Queensland prisons were on day release or in open facilities.

Our success was apparently not backed up by others who attempted to use Fol for news gathering. It became clear to me what we were doing right when the *Courier-Mail* ran a piece on secrecy in Queensland. Their reporter detailed the 'excuses' for non release of information. While there was some justifiable evidence of secrecy, such as ridiculous documents getting Cabinet status, there were times when their own refusal to compromise on a request stopped any chance of getting the information in a timely fashion. Instead of getting high and mighty with Fol officers and refusing their suggestions out

of hand, journalists need to treat them like any other source, and that means give and take.

One example is information involving individuals. As most of my requests were fishing expeditions, names were not really important. Often they were deducible anyway outside the Fol process. Names also bog down the process with notification and appeal periods, none of which I want to worry about. I would rather get the guts of a story out to the public without a name in 30 days than wait 90-120 days for the same information with a name. You have already got the jump on your competition so a name to go with the story can be found later using traditional methods. Other changes suggested by Fol officers in my search for information have helped rather than hindered my use of the legislation. In the federal sphere — where my experience is that large costs bills are used to stop Fol requests in their tracks — such advice can also help reduce the costs. Where the name is important you make sure the request is highly focused and take advice from the Fol officer involved because it will be their interpretation of the legislation that decides whether you get the information over the objections of the individual involved. By doing this we managed to Fol personal documents and the disciplinary record of a senior bureaucrat in Queensland Police last year.

The other thing for journalists approaching this is to think Fol. Every week or even every day as a journalist somebody says something somewhere that hints at a story buried deeper but which they won't give you. This is the area where journalists can best use Fol. So when the Criminal Justice Commission planned to move offices in Brisbane it seemed like an ideal opportunity to test this theory. Fol the office of public works for their initial request detailing requirements, including details of the suite of apartments they keep for witnesses under protection etc. It seemed like a masterstroke. Of course it did not work — on the grounds that the detail of their office requirements would hinder their work fighting crime, but that is the sort of thinking you have to employ as a journalist using Fol.

Overall to use Fol as a journalist in Australia takes money, an enterprising nose for a story, persistence and compromise. There are very few experts and I would not

count myself among them as it takes years and years of constant work to know the system inside out. Most journalists I know have given up using FoI because it is too time consuming, does not yield enough results and is simply frustrating. I still think it is worth the effort but you need back up and organisation. You have to think three months ahead. You need to structure your FoI requests so that a regular stream is going out and after three or so months you get a regular stream coming in. You need to work for an organisation ready to commit \$10,000 a year or more to your efforts because if you send two or three requests a week, that's \$90 in application fees and the success rate is probably less than one in three.

Additionally there is the cost of photocopies. In Queensland I got crash statistics for police cars for three years. The detailed report from their insurer was over 300 pages. All up the photocopying cost \$160. It may not sound like much on its own but when it's one of 100 stories in the paper, every dollar counts. This is why federal departments know they can use costs to hinder access



because not even a large company like News Ltd is willing to waste more than a few hundred dollars on a fishing expedition unless they know they will get some sort of result for their efforts.

I began studying the differences between FoI in Australia and in the US as part of an ill-fated honours thesis and found — to my surprise — there is very little difference. Journalists struggle with the same things. There is more of a culture of helpfulness on the part of agencies in the US in at least some cases, probably because of the greater emphasis on the media as the fourth estate. I have read case studies of a government department offering to cross match two databases on individuals in such a way as to protect identities while providing the journalist access to the information required. In Australia I could not see that happening just yet. It appears the Electronic FoI Act in the US has not made things much better and compliance is not high. However the culture of declassifying documents and placing them on the web en masse is a good development, one which enterprising journalists in Australia could use if it were done here.

Overall I have to say I agree with many of the recommendations in the Commonwealth Ombudsman's Report on the administration of FoI legislation in Australia, in particular, that some federal departments appear to be using unreasonable costs to block reasonable FoI requests. I also agree that in some departments there appears to be a culture of secrecy rather than openness in their interpretations of the Act. But in conclusion I would have to let journalists take some of the blame for letting a wall be built because, as with any source, two-way communication and compromise are required a lot of the time and the chest beating should be spared for when it is really important.

#### SIMON KEARNEY

*Simon Kearney is now National Political Writer for The Sunday Telegraph, based in Parliament House, Canberra. Previously he was Police Reporter for The Sunday Mail in Brisbane.*

## VICTORIAN FOI DECISION

### VCAT

#### BRUCE MILDENHALL MP and DEPARTMENT OF EDUCATION (No. 1997/70087)

**Decided:** 16 April 1999 by John Glover, Sessional Member.

*Sections 28(1) (Cabinet documents) – Section 30(1) (internal working documents).*

#### Background facts

The 'Schools of the Third Millennium' project was a key plank of the former Kennett government's education policy. To assist in its formulation, the former Minister for Education set up three high level working groups comprising senior departmental officers from the Department of Education

(the Department) and other departments, external business representatives and principals from some State schools. Mr Howard Kelly of the Department was the Executive Officer of all three groups. 'Group 2' was responsible for formulating the 'Self-Governing Schools' policy, which subsequently found expression in the *Education (Self-Governing Schools) Act 1998*. The general thrust of the Self-Governing Schools policy was to devolve decision-making power from the Department to school councils.

The policy was controversial as it was perceived by some, including Mildenhall, as being the precursor to the privatisation of Victoria's state education system.

#### Procedural history

On 10 June 1997, Mildenhall made a request for 'all documents including reports, briefing papers, memoranda and correspondence relating to the Schools of the Third Millennium Project'. By operation of s.53(1) of the Act, the Department was deemed to have decided to refuse access to the documents sought. On 6 October 1997, Mildenhall lodged an application for review of that deemed decision. At the date of the hearing, there were 10 documents in dispute.

#### Decision

The Tribunal held that access be granted to part of one document, and

to another document in entirety, but that otherwise the remaining documents were exempt under the Act.

### Reasons for the decision

#### *Section 28(1)(b)*

The Tribunal held that one document was exempt under s.28(1)(b). The document was a memorandum from Mr Kelly to senior departmental officers which summarised, and contained extracts from, a submission made by the Department to the Budget Expenditure Review Committee of Cabinet (BERC). At that time (the sub-section has since been narrowed), a document was exempt under s.28(1)(b) if it was a 'document that has been prepared by a minister or on his or her behalf or by an agency for the purpose of submission for consideration by Cabinet or a document which has been considered by Cabinet and which is related to issues that are or have been before Cabinet'. The Tribunal held that the parts of the memorandum that summarised or contained extracts from the BERC submission fell within this description, and therefore that they were exempt.

#### *Section 28(1)(ba)*

The Tribunal held that two documents were exempt under s.28(1)(ba). One of the documents was a memorandum from the Secretary of the Department to the Minister, which summarised, and contained extracts from, a draft Cabinet submission on the Schools of the Third Millennium project. The Tribunal noted that 'documents can be exempted within paragraph 28(1)(ba) without being submitted to or otherwise considered by Cabinet. Documents giving private briefing to Ministers on matters merely 'to be considered' in Cabinet will suffice'. The document fell within this category, and so was exempt.

The other document was also a memorandum from the Secretary of the Department to the Minister for the purpose of briefing him on matters to be considered by both BERC and Cabinet. The Tribunal held that the document related to matters to be considered by both Cabinet and a Cabinet committee, and hence was exempt.

#### *Section 28(1)(c)*

The Tribunal rejected the Department's submission that one document was exempt under s.28(1)(c).

The document was a memorandum from Mr Kelly to the Secretary of the Department to brief him on aspects of the Schools of the Third Millennium project. The Department submitted that the memorandum was exempt because it referred to matters in a Cabinet document. The Tribunal rejected this submission, noting that the document in dispute was not 'a quotation or paraphrase of a Cabinet document' and that a reference to the Cabinet document did not reproduce any part of it. For that reason, the memorandum was not exempt under s.28(1)(c), and the Tribunal ordered that it be released.

#### *Section 28(7)*

Section 28(7) provides that, for the purpose of s.28, any reference to 'Cabinet' includes a committee or sub-committee of Cabinet. In other words, a document may fall within s.28 even if it is not related to Cabinet, but instead is related only to a committee or sub-committee of Cabinet.

The Department submitted that the three high level working groups were committees or sub-committees of Cabinet, because they were established by the Minister (himself a member of Cabinet) in the context of formulating a policy that would ultimately require approval from Cabinet and BERC, and because papers and Minutes of the working groups were marked 'Cabinet — In Confidence'. The Tribunal rejected this submission. The Tribunal stated that:

none of the members of the working groups were Cabinet members in order for the documents to come within paragraphs 28(1)(a) or (d). Additionally, [one of the documents] was not 'considered' by Cabinet within paragraph 28(1)(b). Nor was it addressed to a Minister within paragraph 28(1)(ba). This submission fails, despite the views of Mr Howard Kelly and the marking of working group papers as 'Cabinet — In Confidence.'

(See comments below.)

#### *Section 30*

Mildenhall conceded that all of the documents for which the Department claimed an exemption under s.30(1), fell within the scope of s.30(1)(a) (that is, that their disclosure would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the deliberative

processes involved in the functions of an agency or Minister or of the government). Thus the only issue was whether, in respect of each document, disclosure would be contrary to the public interest.

The Department relied on four general arguments for submitting that the release of various documents would be contrary to the public interest.

First, that disclosure would affect the development of high level policies because it would inhibit the 'candour and frankness' with which officers may discuss such policies in the future. The Tribunal held that the 'frankness and candour' ground of public interest is not concerned with the genesis of a document; rather, it focuses on the way in which officers might express themselves in the future if the document were disclosed. In respect of documents which contained comments written by Mr Kelly, the Tribunal stated that:

Mr Howard Kelly was asked about the candour of his advice in cross-examination. He acknowledged being aware of the existence of the Freedom of Information Act 1983 (sic) (Vic) at the time that he gave the advice in question. He admitted that he was aware of the 'prospect' that the advice he tendered would be disclosed pursuant to the Act's terms. Mr Kelly was then asked about what difference disclosure of a document like document 8 would make to his functioning in an official character in the future. Mr Howard Kelly said that he would continue to give 'honest and fearless advice' to his superiors. He rejected the hypothesis when put to him that his future performance of official tasks would be affected by the possibility of FoI disclosure in this case. This was significant. The Tribunal is not concerned with the genesis of document 8. Instead, the application of the 'candour and frankness' ground of the public interest looks only to the way in which Howard Kelly might express himself in the future in the event that document 8 is disclosed.'

Because Mr Kelly's evidence was that his advice in the future would not be altered if the document was disclosed, the Tribunal concluded that the Department had not made out its case that release of the document would be contrary to the public interest by reason that its disclosure would affect the future candour and frankness of Mr Kelly.

In respect of one document, which was created by the Secretary of the Department, the Tribunal noted that Mr Kelly's evidence was that, in his opinion, the Secretary's candour and frankness in the future would be

affected if the document was disclosed under the Act. The Secretary himself did not give evidence before the Tribunal. Nonetheless, the Tribunal concluded that Mr Kelly's evidence created an unrebutted inference that the Secretary's candour and frankness would be affected in the future, and therefore that its release would be contrary to the public interest. This must be contrasted to the approach adopted by the Tribunal to another document in dispute, in respect of which Mr Kelly gave the same evidence. In that case, the Tribunal considered that as the Secretary did not give evidence and was not available for cross examination, it was 'by no means self evident' that the Secretary's candour and frankness would be affected in the future by the release of the document. On balance, the Tribunal concluded that release of the document would not be contrary to the public interest (see comments).

The second argument on which the Department relied was that release of the documents would be contrary to the public interest for the reason that it would disclose possibilities which were considered during the early stages of policy formulation, but which were ultimately rejected, and therefore may now cause confusion if released. In most cases, the Tribunal rejected this argument and held that, on balance, the public interest in disclosing the documents outweighed the public interest in preventing any detriment that may have resulted from their release. However, in respect of one document, the Tribunal drew the opposite conclusion (see comments) and held that:

The Tribunal acknowledges that negotiations between the Department and the School communities were conducted in a spirit of trust. Good faith of Departmental officers may be unjustly questioned by the disclosure of policy options which the Department once considered, but were not a part of its eventual negotiating position. The Tribunal accepts that this ground of public policy outweighs the policy which the applicant has adduced in favour of the disclosure of [one of the documents in dispute].

The third argument on which the Department relied was that release of the documents would be contrary to the public interest because some of the documents were drafts, and that it was contrary to the public interest for drafts to be released. In respect of one document, which the Tribunal found to be a draft, the Tribunal held that the public interest in

protecting drafts outweighed the public interest in the release of the document. In respect of the other documents, however, the Tribunal found that they were not drafts (despite one of the documents being marked 'draft') and hence that their release was not contrary to the public interest. As a result, one of the documents was ordered to be released in part (the information that was not required to be released was personal information relating to Mr Kelly, which Mildenhall did not pursue).

Finally, in respect of three other documents which contained records of the deliberations of 'Group 2', the Tribunal noted that the groups contained principals of some state schools who participated in the groups voluntarily, and that Mr Kelly's opinion was that they may have been unwilling to participate had they known that the deliberations may have been made public. None of the principals gave evidence. However, the Tribunal accepted that the Department had the need for voluntary 'outside help' on such groups, and that disclosure of the deliberations of the groups may hinder the ability of the Department to obtain the participation of such people in the future. For that reason, the Tribunal held that the release of those documents would be contrary to the public interest.

### Comments

I have two general comments to make about this decision. First, the Tribunal appeared to misconstrue the Department's submission that the working groups were committees or sub-committees of Cabinet for the purpose of s.28(7). In rejecting this submission, the Tribunal considered that it was relevant whether or not any of the members of the working groups were members of Cabinet, and whether or not any of the documents were considered by Cabinet. It is submitted that the proper inquiry is whether or not the working groups were in fact committees or sub-committees of Cabinet. If they are found to be so, then it follows that it is irrelevant whether or not any members of the working groups were members of Cabinet, or whether the documents were considered by Cabinet. Instead, the effect of s.28(7) is that s.28 would apply to the working groups as if a reference to 'Cabinet' was a reference to the working groups. Having said that, there would be significant hurdles facing an agency that sought, in

a future matter, to establish that groups such as the working groups (which did not contain any members of Cabinet and which did not report directly to Cabinet) were in fact committees or sub-committees of Cabinet.

Secondly, it is difficult to reconcile the Tribunal's approach towards the application of s.30(1) to many of the documents in dispute. The Tribunal came to two opposite conclusions in respect of the two documents created by the Secretary. In the absence of evidence from the Secretary, it is submitted that the preferable conclusion was that the release of the relevant documents would not be contrary to the public interest, at least in so far as the 'candour and frankness' argument is concerned. The Tribunal also came to two opposite conclusions in respect of the application of the 'confusion' argument to some of the documents in dispute. It is not apparent from the judgment why it did so.

[J.J.W.]

# NSW FoI DECISIONS

## ADMINISTRATIVE DECISIONS TRIBUNAL

### NOTE

Some 22 decisions by the Administrative Decisions Tribunal have now been given dealing with FoI issues. Rather than report such decisions singly, this issue and the next will deal with them in groups based on a theme involved in each. In the interests of economy the usual chronology of the handling of the application is omitted as is citing of the legislation. Where consideration of the actual contents of the documents is relevant they are noted but otherwise they are not except to indicate what the applicant was seeking to obtain.

In this issue three themes are examined based on six decisions:

- the correct approach to FoI decisions,
- the legal professional privilege exemption, and
- agency decision-making transparency: internal working documents.

Across these three themes it is possible to see an emerging Tribunal approach to public interest considerations as they operate on the various provisions of the *FoI Act*.

Themes in the next issue of the Review include: the ADT's approach to 'dobbers', the *FoI Act* and secrecy provisions in other legislation, applications to amend records, and the award of costs.

Feedback from readers regarding this approach would be welcome.

[P.W.]

### Part 1: The correct approach to FoI decisions

#### MANGOPLAH PASTORAL CO PTY LTD v GREAT SOUTHERN ENERGY [1999] NSWADT 93

**Decided:** 30 September 1999 by M.B. Smith, Judicial Member.

**Related cases cited below:** *Kay* (See Part 2), *Daykin* (See Part 2), *Kay (No 2)* (See Part 2) and *Tuncheon* (See Part 3).

### *FoI Act 1989*

*Section 5 — Parliament's intention regarding interpretation of the Act — interpretation to further the objects of the Act.*

*Section 16 — applicants have legally enforceable right of access.*

*Section 24 — duty on decision maker to give or refuse access.*

*Section 25 — grounds for refusal of access — use of 'may' in section — no mandatory duty to refuse access — ADT can apply same discretion.*

*Sections 64, 65 & 66 — determinations under Act — liability.*

### *Administrative Decisions Tribunal Act 1997*

*Section 8 — reviewable decisions.*

*Section 55 — time for making review application.*

*Section 63 — review functions of ADT — what is correct and preferable decision — ADT has same function as original decision maker.*

*Section 124 — application of ADT Act to documents under FoI Act — ADT is exercising power under FoI Act not ADT Act.*

### Comments

Starting with the decision in *Mangoplah* (the facts are given in Part 2, but in essence the case concerned the legal professional privilege exemption) and reinforced in subsequent decisions by two other Tribunal members, the ADT has mapped out clearly its approach to the handling of FoI matters. Equally clearly it appears the ADT will assess the decisions originally made by agencies against its own approach, and this will enable systemic issues to be addressed in other quarters.

Four of the five cases concern the legal professional privilege exemption and one the internal working documents exemption and those aspects are considered below in Parts 2 and 3 respectively.

In *Mangoplah* the ADT examined ss.5, 24 and 25 of the *FoI Act*, and concluded (at para 14):

The general effect of these provisions is to impose a duty to make a determination on the giving or refusing

of access as provided by s 24. Section 25(1) then provides the grounds on which access may be refused. Absent a decision to invoke one of these grounds, the decision-maker is obliged to give effect to the 'legally enforceable' right of access conferred by s 16. In this context, in my opinion, the use of 'may' in s 25(1) means that there is no mandatory duty to refuse access whenever one of the grounds for refusal is capable of being satisfied. In relation to paragraph (a) [of s 25(1) — *exempt documents — Ed*], this means that a discretion is given whether or not to release a document which is found to be an exempt document.

If a document is not covered by any of the grounds in s.25(1) the decision maker cannot refuse access. Even if a document is exempt, and is not covered by a Ministerial Certificate the ADT stated (at 16):

... he or she must also consider whether it is consistent with the objects of the Act for the agency to rely upon the exemption and refuse access. If refusal of access appears not to be justified in the broad context of the Act, then the exempt document must be released.

17 This discretion to release most exempt documents is sometimes referred to, inaccurately, as an 'override' or 'residual' discretion, and later in these reasons I will say more as to the relevant considerations. In my opinion it is of fundamental significance for the working of the legislation, and the *FoI Act* will fail to meet its objective to promote open government if the discretion is ignored or not given proper scope by decision-makers.

In the cases of *Kay* and *Kay (No 2)* another Tribunal member took the opportunity to comment on *Mangoplah*. In *Kay* the ADT noted (at 54) that having determined the exemption did apply to the documents, the next issue was whether the Tribunal did have the discretion to order the release of an exempt document, and if so should it exercise it. Neither party made any submissions on these issues so the matter came up for decision in *Kay (No 2)*.

In *Tuncheon*, Judicial Member Smith explored and applied the approach he had taken in *Mangoplah*, especially regarding his exercise of the s.25 discretion. Further comments are given below on *Kay (No 2)* and *Tuncheon*.

Before turning to the issue of whether the discretion applying to

the original decision-maker passed to the ADT the application of ss 64, 65 and 66 of the *Fol Act* was considered in *Mangoplah*. These sections provide protections from liability to decision-makers who give access 'pursuant to a determination under this Act'. The ADT observed (at 18):

A decision not to claim an exemption but to release an exempt document in response to an application made under the *Fol Act* must, in my opinion, be a 'determination under this Act'.

It arose again in *Kay (No 2)* but the ADT after quoting the above comment and noting the respondent did not make any submission challenging the conclusion, accepted it.

Another agency self-imposed shackle on releasing documents has been rightly swept away by the ADT.

One further impact of this particular approach relates to the issue of whether an agency that releases documents in response to a recommendation or suggestion by the Ombudsman is protected by ss.64, 65 and 66. Section 52A of the *Fol Act* enables an agency to review its determination as a result of dealings with the Ombudsman. Given this 'expanded' approach to the making of a determination it seems beyond doubt the agency would be protected where it released otherwise exempt documents on the basis of the s.25 discretion.

In *Mangoplah* the ADT having determined a document was covered by the claimed exemption decided it was then necessary to determine whether it had the power to consider the 'override' discretion. The ADT contrasted its position with that of the previous regime where the District Court dealt with *Fol* External Review matters. The District Court was specifically prevented from ordering release of an exempt document. The ADT examined both Commonwealth and Victorian legislative review processes, the former mirroring the former NSW position the latter providing for an override power, and noted:

79 The benefits of external review reaching into all elements of a primary decision to withhold release are apparent. In particular, it must have the tendency to encourage agency decision-makers to address their full discretion to release documents and to discourage them from thinking that their role is merely to locate at least one exemption which, in its terms, is capable of application to a document. Recent commentators on the operation of *Fol* legislation in Australia, including some Ombudsmen, have detected and

complained of such thinking as a common occurrence.

The ADT then asked whether the NSW Parliament had followed the Victorian approach or had merely re-enacted the former scheme.

The *Fol Act* (s.53) provides a right for a person to seek a review of an agency *Fol* determination by the ADT. This provision means the determination is a 'reviewable decision' by virtue of s.8 of the *ADT Act*, allowing the person to apply under s.55 of the *ADT Act* for a review, such review being dealt with by the ADT in accordance with s.63 of the *ADT Act*. The ADT decided the Parliamentary intention was that it would provide 'merits review' and said the 'substantive function' for the Tribunal under s.63(1) of the *ADT Act* is to decide what is the 'correct and preferable decision', subject to material presented, including applicable law. In other words the ADT was to look at the merits of the primary decision within the same legal criteria as the original decision maker. This was also the developed position of the AAT. The Tribunal stated:

85 Consistent with this jurisprudence, absent any special limitation on the Tribunal's review function in applications under the *Fol Act*, it has the function by reason of s 63 of the *ADT Act* — indeed the duty — when reviewing a determination under ss 24 and 25 of the *Fol Act* to consider all issues arising in the case in relation to whether a document should be released. As indicated above, once a ground for refusal of access arises under s 25(1)(a) the issue arises whether to exercise the discretion ... The decision under review must have, or must be taken to have, addressed this discretion before determining to refuse access on the ground of an exemption. The Tribunal must also address it.

It was thought s.124 of the *ADT Act* might interfere with this interpretation. The heading to the section is 'Application of Act to exempt documents under Freedom of Information Act 1989' and the section recites a number of mechanical provisions about disclosure, which given the ADT's conclusion, it is not necessary to reproduce here.

The ADT stated:

87 There are some difficulties in deciding the scope and intention of this provision. The Explanatory Notes do not assist. The section is not, in its terms, directed at placing a special limitation on the Tribunal's review function in its *Fol* jurisdiction. In its context and terms it appears to be directed at procedures common to all jurisdictions and at preserving the operation of the *Fol Act* in areas of

government which may become involved in any of the Tribunal's jurisdictions. Its objective is to prevent parties using an application to the Tribunal to circumvent the procedures for obtaining access to documents under the *Fol Act* ... What is clear, is that its restraints on the Tribunal are confined to a provision 'in this act', ie the *ADT Act*, which otherwise 'requires or authorises' disclosure of an exempt document.

It followed therefore to the Tribunal that if it was considering an application for review under s.63 of the *ADT Act* regarding a determination made under the *Fol Act* it was not re-examining the exercise of power in the *ADT Act* but in the *Fol Act*. If the ADT decided the original exercise of power did not lead to the 'correct and preferable' decision and substituted its own decision for disclosure, that power of disclosure comes from the *Fol Act* not the *ADT Act*. This means s.124 is not applicable. In *Kay (No 2)*, Deputy President Hennessy (at para 21) adopted this view of s.124, despite the respondent's submission that s.124 acted to re-introduce the old s.55(5) of the *Fol Act* that prevented the District Court ordering access to an exempt document. The issue did not arise in either *Daykin* or *Tuncheon*.

This left the issue of how the Tribunal should exercise the 'override' discretion. In *Mangoplah*, Judicial Member Smith stated:

90 In general, whether there is occasion to exercise the override discretion must depend upon the particular exemption and the circumstances of the case. The statutory criteria for some exemptions themselves bring into balance all public interest considerations which could favour release or justify withholding. Other exemptions have more limited criteria. For these, satisfaction of the criteria provides a justification for withholding the document, but does not complete the decision-making. The decision-maker must decide whether there is something about the information itself or the surrounding circumstances which, bearing in mind the objects of the *Fol Act* and the rationale for any exemption which has been satisfied, persuades him or her that the exemption should not be claimed. The touchstone is whether withholding the document is 'reasonably necessary for the proper administration of the Government' (s 5(2)(b)).

91 Framing the question in this way produces a need to locate special or overriding circumstances or interests before an exempt document is released, but only in the sense that some reason particular to the circumstances should be found for not claiming the exemption. I would not see the question as necessarily suggesting

that such a release would be rare, unusual or exceptional. In some areas of government, there may be many documents which fall within an exemption but, for example, whose public interest in release is overwhelming, or whose potential for relevant damage is so obviously remote as to leave disclosure totally innocuous.

In *Kay (No 2)* the ADT cited *Mangoplah* in support of its approach to s.63(1) of the *ADT Act*. Despite argument by the respondent against its approach the Tribunal stated:

12 Significantly, s.63(1)(b) obliges the Tribunal to determine the correct and preferable decision having regard to any applicable written law. On the face of it, such a law is s 25(1) of the *Fol Act* which, among other things, confers a discretion on the agency to give access to an exempt document. Consequently, in determining whether the agency made the correct and preferable decision, the Tribunal appears to be obliged to take into account the provision giving the agency a discretion to give access to an exempt document. The Tribunal must then make a determination to vary or set aside the agency's decision if the Tribunal takes the view that the discretion should have been exercised in the applicant's favour.

In *Tuncheon* the aspect of greatest interest (discussed in detail in Part 3) concerns the approach to the exercise of the discretion in conjunction with consideration of the exemption claimed. At para 39 of *Tuncheon* the Tribunal made it clear a decision for or against disclosure is not fixed in time. The balance may swing in favour of disclosure in the future. The message here might be that even in the time between an application to an agency, a request for internal review and an appeal to the ADT, different approaches might be taken to the decision to release or withhold.

As to the likely approach of any higher courts to this approach in *Daykin*, Judicial Member Smith noted:

3 The case before me therefore requires me to return to reasoning I adopted in *Mangoplah*... My opinions in that case have not had the benefit of examination by an appellate body, but were applied by the President of the Tribunal in *X v Director-General, Department of Community Services* [1999] NSWADT 141 at [73-76]. I propose to adhere to them.

The decision in *Daykin* is on appeal (see Part 2) but on 22 June 2000 the ADT gave a decision in *Charteris v General Manager, Leichardt Municipal Council* [2000] NSW ADT 81 adopting the same approach as in the decisions examined here.

[On a minor point the author of these notes took the NSW Department of Health to the ADT on this very basis in relation to the Department's use of the Cabinet document exemption regarding a report of a review of certain legislation. The argument was that not only was the claimed exemption incorrect but even if it was the Department could still release the document under s.25. The Department opposed this interpretation but the matter was never determined by the ADT, as the document was released to the public. The testing of the nexus between the s.25 discretion and the Cabinet document exemption will have to await another day.]

As it can be expected agencies would be highly resistant to releasing a document for which an exemption might be claimed it may well be prudent in some cases for applicants to include reasons in their applications, even though there is no obligation on them to do so. [The author has done this in the past in many of the applications he has lodged and the reasons are usually ignored or rejected.]

In any event s.28(2) of the *Fol Act* requires reasons to be given for refusal to release a document, so it is to be expected agencies will now include in their notice under s 28 not only why their claim for refusing to release the document is justified but why they chose to exercise their s.25 discretion in the way they did.

## Part 2: Legal professional privilege

### MANGOPLAH PASTORAL CO PTY LTD v GREAT SOUTHERN ENERGY

[1999] NSWADT 93

**Decided:** 30 September 1999 by M.B. Smith, Judicial Member.

### KAY v COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES

[2000] NSWADT 34

**Decided:** 31 March 2000 by N. Hennessy, Deputy President.

### DAYKIN v SAS TRUSTEE CORPORATION

[2000] NSWADT 34

**Decided:** 1 May 2000 by M.B. Smith, Judicial Member.

**NB:** This matter is now on appeal — see comments in text.

### KAY (No 2) v COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES

[2000] NSWADT

**Decided:** 31 May 2000 by N. Hennessy, Deputy President.

### Freedom of Information Act 1989 (NSW)

*Section 25 — no mandatory duty to refuse access — discretion to grant access to exempt document — whether ADT should exercise discretion to grant.*

*Clause 10, Schedule 1 — documents attracting legal professional privilege — dominant purpose test — intersection with Evidence Act.*

### Administrative Decisions Tribunal Act 1997 (NSW)

*Section 125 — non-disclosure to ADT of documents attracting privilege — ADT operating under Fol Act not ADT Act.*

## Introduction

In addition to its legal correctness, the utility of the approach adopted in the *Mangoplah* case, and subsequent decisions, as outlined in Part 1, is clearly demonstrated in relation to the cl.10 exemption.

The correct and preferable approach (so to speak) to the handling of *Fol* applications, where the cl.10 exemption is selected as the grounds for refusal, can best be determined on the basis of a clear understanding of the source of legal professional privilege.

As is commonly pointed out, the privilege is that of the client not of the lawyer. It is the client who has the right to consent to the release of documents that otherwise might be withheld. In the context of *Fol* legislation the legal professional privilege exemption is claimed by an agency of the state. Equally so, such an agency in the position of the client is exercising a discretion whether to claim the privilege. It is the exercise of this discretion that should be the focus not only of the original decision maker but of the ADT once it is asked to conduct a review. The ADT in the three cases under review seems to be doing this in its approach to s.25.

## The facts of the *Fol* applications

The three cases involved applications for very different types of documents.

- *Mangoplah*: the respondent supplies power in southern NSW. It supplied power to the applicant's farming property. In December 1997 a fire started on the property and spread to others. It took four days to control the fire. Stock, property and hay and pasture were destroyed. The fire may have started near a fallen power line on the applicant's property. In November 1998 the applicant's solicitor lodged an FoI request for various documents. Exemption was claimed on the basis of cl.10. By the time of the ADT hearing 19 documents remained in dispute and these included photographs of the fire scene, a video, handwritten notes by various employees, other reports and a letter from the respondent's solicitor. The ADT upheld the claim for privilege on the solicitor's letter but ordered release of all the other documents.
- *Kay*: the applicant is an employee of the Department of Corrective Services. He has his own web site. In 1998 the Department conducted two investigations concerning the contents of the web site. Certain directions were given to Kay about the contents of his web site. The investigations were being conducted to decide whether to lay formal charges under relevant public sector legislation. Legal advice was sought during these investigations. Kay sought copies of memoranda prepared by the agency's employed legal officers. The agency rejected the application relying on cl.10 and the ADT affirmed the agency's determination [if anyone is interested the web site address is: <http://www.ozemail.com.au/~mickay/gunroom.htm>].
- *Daykin*: the applicant is a former police officer who sought a copy of a report prepared by an orthopaedic surgeon. The report had been requested by the agency. The application was in connection with an ongoing matter involving Daykin's medical discharge from the Police Service and his related superannuation entitlements. There was also litigation in relation to his discharge in the Industrial Relations Commission of NSW and the agency has sought leave to appeal to the Full Bench of the Commission regarding the decision in that forum. The ADT

ordered release of the doctor's report.

**Note:** The Daykin matter is now before the Appeal Panel of the ADT. There was a Directions Hearing on 20 June 2000 and it is likely to be heard at the end of July 2000. It is understood the appeal raises two issues. The first is that the ADT was wrong in its finding of fact regarding the 'dominant purpose' of the doctor's report. The second raises the issue of disclosure of a document via FoI where the same document would be privileged in the proceedings in the Industrial Relations Commission. It is also understood there is no challenge to the ADT's view either of the s.25 discretion or its jurisdiction to make the same decisions as the original decision maker. This does not mean the Appeal Panel will not revisit these issues.

#### Clause 10, the Evidence Act and the dominant purpose test

What is the intersection between cl.10 and the *Evidence Act 1995* (NSW)?

In between the *Mangoplah* and *Kay* decisions the High Court bought down its decision in *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67. As a result it is not necessary to examine the detailed reasoning in *Mangoplah*. In *Kay* the impact of the *Esso* decision was noted. In essence the High Court changed the common law test of legal professional privilege from a sole purpose test to a dominant purpose one. In *Kay* the ADT recognised that it was not necessary to consider whether the common law or the *Evidence Act* applied to the cl.10 exemption because the High Court's decision makes the common law test consistent with the Act (see 30-31).

In *Daykin* the Tribunal took a similar view (36) and also repeated its view from *Mangoplah* that in constructing the meaning of cl.10 the tests to apply were those applicable at the time the FoI application is being determined. It added:

35 ... Moreover, the breadth of the term 'in legal proceedings' encompasses all stages of legal proceedings, so that, if current law require different tests to be applied at interlocutory stages and at the hearing, the exemption will arise under whichever test gives the broadest privilege applicable in the particular circumstances.

Perhaps there is need for some amendment of cl.10 to formalise its relationship to the *Evidence Act*.

In essence cl.10 cases will involve detailed examination of documents generated or received by agencies. In order to assess such documents to see if cl.10 is applicable (and before considering s.25) the decision in *Kay* provides a good summary of the law. The ADT stated:

38 Subject to the fact that the High Court has changed the common law test from the sole purpose test to the dominant purpose test, I agree with the summary of the law set out in *Re Proudfoot and HREOC* (1992) 28 ALD 734 at 738:

- legal advice given by a qualified lawyer employed by the government can be privileged, at least where the giver of the advice holds a current practising certificate;
- for privilege to attach, the legal adviser must be acting in her or his capacity as a professional legal adviser. This means that the advice must be given pursuant to a relationship of lawyer and client. Such a relationship must exist, and the advice must be given in the course of that relationship;
- a corollary of this is that the circumstances in which the advice is given must be attended by the necessary degree of independence. Thus, if for instance an advice prepared subject to direction as to its contents or conclusions by a person who was not a lawyer would not be privileged;
- the document must be created for the sole purpose of giving legal advice; and
- the advice must be confidential.

As these three decisions turn on issues of fact concerning the generation of the documents it is not necessary to examine them in detail. The three decisions give detailed analyses of the documents sought by the applicants and in each case there is an assessment of the various rules from the cases and the *Evidence Act* about the application of cl.10. As the *Daykin* case is subject to an appeal based on a challenge to the Tribunal's approach to cl.10 rather than to s.25, it is appropriate to await the outcome of the Appeal Panel's hearing of the matter. Section 25 can be considered and is discussed below.

One additional issue arose in *Kay* (*No 2*) regarding the power of the ADT under s.125 of the *Administrative Decisions Tribunal Act 1997* to require disclosure of documents that would otherwise be privileged. The Tribunal took the same approach to s.125 as it did to s.124 (see the discussion in Part 1) by concluding that in FoI matters it was operating under

the *Fol Act* and not the *ADT Act*. Consequently s.125 did not apply (22-25).

### Consideration of the section 25 discretion

Building on the comments in Part 1, the ADT in *Daykin* framed its approach to the s.25 discretion, as it applies to the cl.10 exemption, in the following terms:

57 I set out my general approach to the override discretion in relation to the legal professional privilege exemption in *Mangoplah* (supra) at [90-95]. I proposed a test of whether 'there is something about the information itself or the surrounding circumstances which, bearing in mind the objects of the *Fol Act* and the rationale for any exemption which has been satisfied persuades (a decision maker) that the exemption should not be claimed. The touchstone is whether withholding the document is 'reasonably necessary for the proper administration of the Government' (s.5(2)(b)).

It may be possible to recast this test to fully reflect that it is the client's decision and in this case the client is the state. In a way the state is a unique client, and in other areas of law [eg contract law] additional expectations arise as a result of one party being an arm of the state [for example, *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Reynard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234]. Some recognition of this was made in *Mangoplah*, when the Tribunal considered aspects of the s.25 discretion:

94 ... Some examples of considerations which may or may not be relevant are: whether release is consistent with the requirement that public authorities act as 'model' litigants; any special disadvantages facing claimants against government; whether the document is innocuous by reason of its stale or trivial contents; the need to clear the air from suspicions of significant impropriety in government; or the need to expose significant impropriety.

The same thing occurred in *Kay* (No 2):

47 As a general rule, keeping documents secret which are covered by legal professional privilege, is necessary for the proper administration of government. It facilitates representation by legal advisers, induces government agencies to retain solicitors and seek their advice and encourages them to make a full and frank disclosure of the relevant circumstances to the solicitor. The circumstances of this case which are said to override this consideration are that disclosure would tend to reveal

whether the agency has acted fairly in relation to the investigation of Mr Kay's activities.

48 This case is very similar to the facts in *Re Titelius and Ministry of Justice* [1998] WAICmr 16 (10 June 1998). Like the applicant in that case, Mr Kay is still an employee of the agency and there is some force in the Western Australian Commissioner's assessment that allowing an aggrieved employee access to documents, even if only by inspection, would be consistent with good human resource management practice. Such a gesture may have assisted Mr Kay to understand the agency's processes and reasoning in the conduct of the investigation.

At the heart of comments about the policy underpinning the privilege attaching to legal advice, especially in criminal matters, is a characterisation of the client as a person who must somehow be given an opportunity to compete on equal terms with their adversary. [See the comments of Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685.]

It is inappropriate to characterise state agencies in terms suggesting either they are equal to or in a disadvantaged position compared to other litigants or potential litigants. With the exception of major corporations, state agencies are in a position of having superior resources to most other potential litigants, especially in the case of their current or former employees or clients.

In framing a test to apply to the decision of an agency to assert its privilege as a client some recognition might be explicitly given to such factors as the inequality of the parties and the need to protect the legitimate interests of the agency, beyond merely the notion of 'the proper administration of the Government'. I am embracing here some of the criteria to be found in legislation dealing with unfair contracts [eg s.9 of the *Contract Review Act 1980* (NSW) or s.51AC of the *Trade Practices Act 1974* (Cth)] as they provide useful criteria for expanding the considerations an agency should take into account in making a decision under s.25. The writer currently has an *Fol* case in action involving an agency's use of cl.10, where it may be possible to test the ADT's attitude to such an approach.

[P.W.]

### Part 3: Agency decision making transparency: internal working documents

#### BENNETT v VICE CHANCELLOR, UNIVERSITY OF NEW ENGLAND [2000] NSWADT 8

**Decided:** 12 January 2000 by N Hennessy, Deputy President.

#### TUNCHEON v COMMISSIONER OF POLICE, NEW SOUTH WALES POLICE SERVICE [2000] NSWADT 73

**Decided:** 7 June 2000 by MB Smith, Judicial Member.

#### *Freedom of Information Act 1989 (NSW)*

*Section 25 — discretion to release otherwise exempt documents.*

*Clause 9, Schedule 1 — internal working documents — meaning of public interest.*

*Clause 13, Schedule 1 — documents containing information obtained in confidence — prejudice to future supply.*

#### Introduction

These two decisions are very important because of their contribution to the development of the ADT's approach to the interpretation of the *Fol Act* and in particular its enunciation of its view of the public interest.

In brief the applications concerned the following :

- Tuncheon sought a copy of a consultants report titled: 'Report to the NSW Police Service — Review of Human Resources and Development Command and its Functions'. He is a serving police officer and former President of the Police Association and made his application on behalf of the Association. The report arose as part of the ongoing reform of the NSW Police Service, emanating from the recent Royal Commission into the Police Service.
- Bennett sought the full text of a document previously released with deletions concerning an investigation into some of the circumstances surrounding the examination of his PhD thesis. Bennett had commenced his PhD in 1977. It was examined in 1983 and ultimately rejected in 1990. After several internal inquiries the University Council (the Council)

awarded the doctorate in 1997. The document sought, known as 'the Lancaster Report', was supplied to the Council in August 1997. It should be noted in this long running matter there was a decision by the District Court under the *Fol Act* (*Bennett v University of New England*, Dunford DCJ, unreported 7 August 1991).

Both cases have similarities and both decisions of the ADT have a certain consistency, despite the actual result. In both of these cases we have agencies carrying out significant public functions. Both see themselves as standing apart from other areas of public administration. In a way both the NSW Police Service (the Police) and universities see themselves in similar terms within public administration. Both regard themselves as unique or special in terms of the jobs they perform, having unique needs justifying special privileges, their members perhaps seeing themselves collectively as similar to the priesthood.

It is important that individuals, be they employees or other types of 'clients', dealing with these bodies should be able to have access to documents concerning those dealings, especially where access may well lead to other issues going to governance, accountability and allocation of responsibility.

### The applications

In *Tuncheon* the Fol application was dealt with between December 1999 and February 2000. The request for the full report was rejected at both levels of the internal handling. The Police cited cl.9, Schedule 1 of the Act as the basis for the refusal. In *Bennett* the report sought was released with deletions. The University of New England (the University) cited both cl.9 and cl.13, as the basis for refusal to release the report in full.

When the *Bennett* matter came before the ADT the cl.13 exemption was rejected on the basis that the report to Council, while obtained in confidence and thereby satisfying the first limb of cl.13(b), did not satisfy the second. Dr Lancaster was required to report to the Council and express his opinions as part of his role. Thus release of the deletions would not prejudice the future supply of information.

### Rationale for the clause 9 exemption

Clause 9 applies to documents that show any opinion, advice or recommendation or any consultation or deliberation occurring in the course of or for the purpose of decision-making processes. It must then be contrary to the public interest to disclose the documents. Excluded is material in a policy document or factual or statistical material.

Cossins' *Annotated Freedom of Information Act New South Wales* (LBC, Sydney, 1997), discusses the rationale for the exemption, and reference is made to her comments, by the ADT in *Bennett* (para. 14) and *Tuncheon* (para. 19).

In essence Cossins shows the rationale is based on the following:

- preservation of the integrity of government decision making;
- fettering the effective discussion of issues of policy and administration;
- preserving the notion of a neutral public service; and
- preserving the anonymity of officials regarding their views (pp.349-50).

As not all documents should be withheld, otherwise why have an Fol Act, the public interest test has been added and as a result, according to Cossins:

More specifically, '[t]he insertion of [a public interest] test requires that the executive state with precision the manner in which its decision-making processes will be affected adversely if the particular documents requested are released': Zifcak, 1991, 165. Thus, whilst there is an explicit rationale for protecting that class of documents, there is also an explicit rationale for the existence of the public interest test under cl 9 which is to promote the democratic objectives of Fol legislation. [p.350]

To await discussion another day, of course, is not only whether the rationale for the exemption was ever justified, but, irrespective of whether it was, given what has happened to the public sector over the last 20 years, is it still?

In a small way these two ADT decisions suggest what the answer might be.

### Nature of the documents

In both cases the decision about whether the documents in dispute satisfied the criteria in cl.9(1)(a) was

straightforward. Both cases held they were (*Tuncheon* para. 45, *Bennett* para. 12). Would disclosure be contrary to the public interest for the purpose of cl.9(1)(b)?

### Approach to clause 9 — meaning of public interest

There is no definition of 'public interest' in the Act, but, in passing, the Tribunal noted s.59A which prescribes as irrelevant to determination of the public interest whether disclosure may cause embarrassment or loss of confidence or cause an applicant to misunderstand or misinterpret a document (B 46). The Tribunal noted the detailed analysis of the meaning of 'public interest' by the Queensland Information Commissioner in relation to this exemption, in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 and stated:

48 I agree with the views of the Commissioner in that case and, in particular, with the view that 'Unless the exemption provisions, and s.41 in particular, (the equivalent of cl.9 of the NSW *Fol Act* are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the *Fol Act*, the traditions of government secrecy are likely to continue unchanged. [*Bennett*]

In *Tuncheon* the potential breadth of documents covered by cl.9 was noted but with the proviso the exemption is 'neutral' about whether fitting within the description caught by cl.9(1)(a) when read with cl.9(2) entitled one to decide whether to keep a document secret. The cl.9(1)(b) element was seen in the following terms:

However, I think it is of more assistance to understand the paragraph (b) test by reflecting on the objects of the exemption as indicated in the class of documents raised for consideration by paragraph (a). From this perspective paragraph (b) indicated the opinion of the legislature that 'the public interest' requires that public openness should accompany or follow government decision-making in some cases, but that in other cases 'the public interest' requires secrecy. The 'neutrality' of this position, prevents approaching the exemption from any general assumption or presumption on the necessity of secrecy or openness of government deliberative documents. The inevitable construction is that the Act intends that choosing between these outcomes must depend upon an assessment of the effects of a present disclosure of the document in the particular circumstances in which the document was or will be used in it

particular 'decision-making' context. [*Tuncheon* 15]

Accordingly the Tribunal's role (as would be the original decision makers) is to look at things like the circumstances of the decision, the role of the document in the decision and then to balance this with whether secrecy is necessary for the 'proper administration of the Government'. It was recognised there was a 'value judgment' in determining what is the 'public interest' and such judgments 'can be difficult to form and rationally to explain' but the general tendency in FoI matters is that disclosure will follow unless secrecy is in the public interest, the onus of showing this resting with the agency (*Tuncheon* 16, 17 and 18).

It seems clear from both decisions that the Tribunal is rejecting the 'class' approach to this exemption. This approach arises from consideration of the 'Howard' factors, arising from the Federal Court's decision in *Re Howard* (1985) 7 ALD 626, where five factors were enunciated to use to assess the public interest against disclosure. The problem with such factors is that original decision makers seize on them and define their decisions within them. Acceptance of such an approach in conjunction with some notion that the decision-making process must be upheld at all costs not only defeats the democratic purpose of FoI legislation but impacts on the role of the ADT in conducting a true 'merits review'. In *Bennett*, the ADT recognised this when it endorsed the following passage in an AAT decision, *Re Dillon* (1986) 4 AAR 320 at 330:

The first public interest ground offered [by the respondent] was that there was a public interest in 'protecting the viability of the decision-making process'. Without more, this is too vague and amorphous a concept to be considered a legitimate public interest. It is, moreover, a tag which an agency could easily attach to any document which is sought not to be disclosed and which, if accepted, would greatly reduce the review function of the Tribunal in this jurisdiction. [*Bennett* 54]

In *Bennett* it appears some of the 'Howard' factors were raised implicitly by the University (see below) but as to the overall approach, in *Tuncheon* the ADT said:

19 Recognising that the exemption requires me to focus on the decision-making context of the particular document without any presumption as to secrecy or openness should assist me to avoid giving undue emphasis to the general propositions which have in the past been proposed

as aids to FoI decision-making on 'internal working documents'. Although generalising on secrecy in relation to classes of deliberative documents is enticing and has added to our understanding of the exemption, experience has shown that generalisations can be distracting and that their revision is inevitable.

The ADT seems here to be following a similar view to that of the District Court in its approach to the 'Howard' factors as stated in *Wilson v Department of Education* (unreported, 21 December 1989).

One final aspect of interest to what might be called the 'class claims' approach is that the University in *Bennett* ran the line that public interest factors for a university differ from those applicable to other areas of government. It drew succour from an AAT decision (*Re Burns and Australian National University (No 2)* (1985) 7 ALD 425 at 440) that suggested the 'essential character' of discussion in a University Council meeting is 'much more like that of debate within a cabinet than within public service administration' (*Bennett* 51). [If such a laughable proposition was upheld it would place university governance beyond the scrutiny of employees, students or citizens. The institution of Cabinet is at the heart of our constitutional arrangements whereas universities are creatures of statute, usually established in the form of a body corporate, with defined limits to their operations.] In restrained terms the ADT rejected the proposition:

52 I agree the university context must be taken into account when applying the public interest test, but I do not agree that a University Council should be equated with or likened to Cabinet deliberations. The framers of the *FoI Act* did not consider the Council of a university to be sufficiently similar to Cabinet to afford such Councils the protections that are afforded to Cabinet documents and deliberations in CI 1 of Schedule 1 to the *FoI Act*. [*Bennett*]

### The approach to the documents in dispute

Both decisions recognised the desirability of the need for openness. In determining the way the ADT balances the public interest factors it should be noted *Bennett* sought documents at the end of a process of decision making, *Tuncheon* wanted a document that had triggered an ongoing, and as yet incomplete, series of decisions. The time line is important. So too is the nature of the documents. Both factors need to be considered together.

In *Tuncheon* the Report had been commissioned by the Commissioner of Police as part of an ongoing reform process and, according to the evidence, the report was 'secret, sensitive and confidential'. It had only been supplied to the Minister, the Commissioner and perhaps three or four people within the Police Service (*Tuncheon* 22). In *Bennett* the report had been distributed to Council members and other officers of the University.

The University argued that the right to know and the need for transparency supported disclosure but these reasons were offset by the need to maintain the Council's capacity to carry out its functions, to preserve its integrity and authority and to contribute to the stability of the University (*Bennett* 56).

According to the ADT:

57 Focusing first on the public interests in disclosure, in general these interests are in enhancing the openness, accountability and responsibility of an agency. There was no evidence that the University had provided Dr Bennett with any reasons for deciding to award him a PhD 14 years after it was submitted and 7 years after it was 'finally' rejected. Consequently Dr Bennett has no way of knowing the reasons for this inordinate delay or the basis for the final decision. Dr O'Shane has stated the reasons for the Council's decision are not necessarily based on Dr Lancaster's views. Nevertheless they are views of a member of Council based on his investigation of the process. In the particular circumstances of this case the revelation of the facts and opinions in the Report will assist Dr Bennett in determining whether the University has acted in accordance with the principles of sound administration in assessing his thesis. If the University does not believe that the Report reflects the real reasons for their decision, it would be open for them to provide those reasons.

This was not the end of the matter. Again referring to the Queensland decision in *Re Eccleston* the ADT recognised 'wider community implications' applicable to *Bennett*'s request. These implications emanated from the idea that the public interest involves seeing individuals receive fair treatment from government, that there is an 'element of justice to the individual' and, accordingly, in *Bennett*'s case, to see if he was treated fairly in the way his PhD was assessed (*Bennett* 58 and 59).

Of interest here is the nexus between consideration of the FoI application and the presence of key administrative law notions of procedural fairness and the giving of reasons. If documents reveal either the

absence of such processes or will actually demonstrate the presence of them, then the ADT may find, in the absence of counter-veiling factors, that release is justified.

In *Tuncheon* the ADT seemed to be adopting a similar approach in terms of principle but given the evidence about the document and the environmental factors arising from the implementation of change in the particular area of the Police Service was able to reach a different, but consistent, conclusion about release. To illustrate this point, part of the Commissioner's argument was that he should be allowed to carry out his reform process without the inevitable turbulence resulting from premature release of the Report. In the evidence presented to the ADT the Police outlined how a staged approach was being taken to the Report's proposals. Even a 'change agent' had been employed by the Police to carry out the changes and the ADT relied on this person's expert evidence on the report and the impact of its release.

The ADT noted:

24 ... Each particular change had to be the subject of decision, either by Dr Chadbourne or by the Commissioner personally. The nature of particular changes proposed, the extent to which they did or did not adopt Morgan & Banks' recommendations, the manner of their introduction and their timing depended on changing circumstances some of which were beyond the control of the Commissioner. These included budgetary, 'people management', and 'political' (in a broad sense) considerations. In his view it could be said that about two thirds of the matters recommended in the Report had been 'implemented', but the remaining matters included many of the greatest sensitivity.

25 Dr Chadbourne gave a general description of his concerns as follows:

'...The Report contains a number of analyses and recommendations which are still under consideration. Not all of the recommendations have been or will be accepted. The premature release of recommendations and proposals — particularly when decisions have not been finalised — often leads to unnecessary unrest and resistance. People can be upset by the recommendations and proposals and by the analyses which underpin the recommendations and proposals. Resistance can emerge to what may only be a vague scheme, or something less. People often fear recommendations even though they may not ultimately be adopted. By the time decisions are made on the basis of a report such as the Report (even assuming that the controversy had not adversely affected the decision) those decisions may not

include the matters which had earlier caused fear, but resistance will often have built to a point from which it will continue regardless of the decision actually made. Moreover, in the period between recommendation and decision the fear and resistance may disrupt and undermine effective work.'

[As an aside the evidence of Dr Chadbourne about the consultant's Report included the observation that a number of the recommendations 'are just not feasible' or 'are not sensible nor durable' (*Tuncheon* 26). This observation was comforting given the impression a consultant's report, much like a lawyer's advice, has come down from Mt Sinai.]

It should not be taken that the mere process of change in an organisation would be enough to justify non-disclosure of relevant documents. In this case special regard was given to the circumstances surrounding the NSW Police reform process and its origins. On this point the ADT specifically rejected what it called 'sweeping submissions of counsel for the Commissioner' (40) and stated:

... My conclusion in this case is not based on any general principle of overriding secrecy in relation to confidentially obtained advice to chief executives from management consultants on restructuring public agencies.

In addition, recognition was given to factors that might support disclosure. The Police ran one line that release would interfere with the conduct of industrial relations (actually taken from cl.16 of Schedule 1) but on this point the ADT observed:

36 ... I was far from persuaded as to such a conclusion. To the contrary, I was left with the impression that the release of the Report might clear the air in relation to general disquiet and improve 'industrial relations': at least to the extent that they concern the Commissioner's relationship with the executive of the Police Association. I therefore consider that this evidence tends to give weight to the public interest in some disclosure at this point of time.

A similar observation was made in *Kay* (see Part 2 above).

Opposed to this view was the material quoted above about the impact on the Commissioner's decision making as a result of premature disclosure, and it was the weight of this evidence that led the Tribunal to affirm the decision not to release the report.

Circumstances may change:

39 This conclusion is very much related to the present circumstances as revealed in evidence. It is quite possible

that the balance of public interest may swing in favour of disclosure in the future, even in the near future, depending on how events unfold. Given the Commissioner's publicly announced commitment to 'implementing' the Report, an appropriate accountability in relation to that commitment may well require the public disclosure of the Report at the stage where the Commissioner has finalised his process of decision-making or has reached such a stage where continuing secrecy cannot be justified.

The Commissioner was given the latitude of making his own decisions about the process of reform and 'the appropriate level of disclosure and consultation' (*Tuncheon* 40). This approach contrasts with the attempt by the University in *Bennett* to implicitly introduce some of the 'Howard' factors into its argument against disclosure. One of these was the 'inhibition of frankness and candour' line but in *Bennett* the ADT considered any diminution in frankness had to have an impact on decision-making and there was no 'clear, specific and credible evidence' to this effect (*Bennett* 63). In any event the Tribunal's view from *Tuncheon* is that a document may be released in the future so if the public interest supports non-disclosure at one point in the decision-making process but disclosure later, then authors can be frank and candid, knowing their advice will not be disclosed until later.

As employees are required to be frank and candid in their advice, as part of their statutory duty, as are consultants as a result of their contractual obligations, it is hard to see the risk if for example the ADT were to order disclosure of a document, earlier in the decision-making process rather than later. Such disclosure may enhance the quality of decision making by getting other stakeholders involved in the process. [Indeed this very issue was the subject of vigorous debate at the recent annual conference of the NSW Branch of IPAA.] In its conclusions the ADT noted the report's opinions and recommendations 'do not reflect favourably on the University's processes' (*Bennett* 77). Release may well be justified to ensure the University has an added incentive to ensure reform of these processes. Similarly the Police Commissioner, knowing the Report sought by *Tuncheon* may eventually be released, will pay close attention to the reform process it addresses.

A second 'Howard' factor raised in *Bennett* was that the document would give an incomplete picture of the reasons for a decision and so would be unfair to the decision-maker. The ADT dismissed this view on the basis the contents of the report clearly identify the author and his views and it is known the Council came to its own decision. As the ADT noted (and which is reflected subsequently in *Tuncheon*):

72 ... All that is being requested is access to a document which represents

the views of one council member. Disclosure of this document cannot affect the integrity of the decision-making process, especially when the decision has now been made. If the Report was still under consideration, there would be a stronger argument for non-disclosure on the basis that the integrity of the process should be preserved.

#### Comments

The crucial message arising from these two decisions is that the balancing process between cl.9(1)(a)

and (b) needs to be based on an objective examination of the actual documents and their place in decision-making and then an assessment made about release under the umbrella of the s.25 discretion. FOI officers and those conducting internal review should note these decisions carefully.

[P.W.]

## FEDERAL FOI DECISIONS

### Administrative Appeals Tribunal

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[N.D.]

#### **BARTLETT and SECRETARY, DEPARTMENT OF SOCIAL SECURITY (DSS) (No. T98/67)**

**Decided:** 4 September 1998 by Deputy President Blow.

**FOI Act:** Section 37(1)(b).

*Matter remitted from Federal Court; AAT erred in law; 'dob-in' or public denunciation call; whether material in a referral to the AFP would enable ascertainment of a confidential source of information; meaning of 'would, or could reasonably be expected to ... prejudice'.*

#### **Decision**

The AAT set aside the decision under review and remitted the matter to the DSS to give access to the document.

#### **Facts and background**

This was a matter remitted to the AAT by the Federal Court to be determined in accordance with the Court's reasons for its judgment. The AAT had in 1996 made a decision that the one document in question in this matter be released to Bartlett subject to five deletions of material which, the AAT had originally decided, were exempt under s.37(1)(b). In the present decision the AAT acknowledged that it had erred in law in that it directed that there should be deletions from the document on the basis that there was a 'reasonable possibility' that Bartlett would be able to identify a confidential source of information. The correct approach would have been to decide on the basis that the deleted passages 'could reasonably be expected to' enable Bartlett to ascertain the identity of the confidential source of information.

#### **Findings on exemption claims**

The AAT referred to the judicial consideration of the meaning of the words 'would, or could reasonably be expected to ... prejudice' in *News Corporation v NCSC* (1984) 5 FCR 88. In that decision Woodward J held the words in question to mean more than 'would or might prejudice': the Court thought it reasonable to expect an event to occur 'if there is about an even chance of its happening'.

In the present case, the AAT applied that test to each of the five passages originally deleted and decided that four of those passages

should be released as being not exempt under s.37(1)(b). Part of the passage (identified in the reasons for the decision as the third passage) was to be released subject to some deletion under s.37(1)(b).

The following information, variously contained in the five passages, was held to be not exempt because the AAT considered that there would be no more than a possibility (as distinct from Woodward J's 'even chance') that revealing the information would, or could reasonably be expected to, disclose the confidential source of information:

- the month in which the information was given to the DSS;
- the substance of the allegation made;
- the fact that allegations were made; and
- a statement by the authors of the referral document about a person associated with, but not actually being, Bartlett.

In the passage, part of which was held to be exempt, details including the gender of the informant and the fact that there was some connection with the city of Launceston were not exempt because they would not, or could not reasonably have been expected to, disclose or enable the ascertainment of a confidential source of information.

It appears from the AAT's reasons for its decision that only the identity of the informant was held to be exempt.

## Comment

The significance of this decision is that it illustrates that the Federal Court can remit questions to the AAT where it has erred in law.

This decision also indicates the degree of precision required in interpreting the words in s.37(1)(b) 'would, or could reasonably be expected to'. They do not mean 'a reasonable possibility' exists as originally held by the AAT.

[N.D.]

## HENRY and DEPARTMENT OF SOCIAL SECURITY (DSS) (No. V98/36)

**Decided:** 10 September 1998 by Senior Member Dwyer.

**Fol Act:** Sections 37(1)(b); 41(1); 59A(3); 61.

*'Dob-in' or denunciation phone call; decision to protect personal information by officer in spite of evidence that the provider did not want to remain anonymous; confidential source of information; unreasonable disclosure of personal information.*

## Decision

The AAT affirmed the decision under review.

## Facts and background

Henry was in receipt of a sole parent pension. On 6 March 1997 and 12 September 1997 two separate 'dob-in' or public denunciation telephone calls were made to the DSS providing information about Henry.

Henry lodged an FoI request for documents 'on all of my dob-ins this year about me'. The DSS provided her with four pages of documents being records of the two telephone calls. The document referring to one of the calls was released in full — it did not contain any identifying details about the caller. The second document was released with five deletions to protect the identity of the caller.

The interesting aspect of the facts is that the caller had apparently indicated to the DSS, at the time of making the telephone call, that he or she had no objection to his or her name and address being released. The departmental officer who took the telephone call ticked the 'no objection' box. Notwithstanding this, the original decision maker exempted sections of the document on the

basis that the disclosure of the information withheld would disclose, or enable the ascertainment of, the identity of a confidential source of information for the purposes of s.37(1)(b). No other ground of exemption was stated by the original decision maker.

At internal review stage, the internal review officer relied on the unreasonable disclosure of personal information ground contained in s.41(1).

## Findings on exemption claims

### Section 37(1)(b)

The AAT rejected the protection of a confidential source of information claim. The AAT considered that the fact that the departmental officer who took the call at the time of taking the call ticked the 'no objection' box meant that it could not find that the informant was a confidential source. The AAT noted that the test in the United States case of *Luzaich* of what constitutes a confidential source of information had been upheld on several occasions by the Federal Court. That test provides that a source is confidential 'if the information was provided under an express or implied pledge of confidentiality' ((1977) 435 F Supp 31 at 35).

The AAT heard evidence on the question of whether the departmental officer who took the call could have made a mistake. The AAT concluded that there was no evidence that the officer had made a mistake. The AAT had indicated at the outset of the hearing that it did not see how the original decision maker could have decided that the informant was a confidential source. Accordingly, an opportunity was given for the departmental officer who took the call to give telephone evidence. It was at this stage that that officer indicated that it was possible, but 'unlikely', that she would have made a mistake.

The AAT then moved on to observe that the AAT is an administrative decision maker and has a responsibility to reach the 'correct and preferable decision' in matters it decides. The AAT indicated that it was concerned about deciding that a document should be released on the ground that the DSS had not discharged the onus of showing that the informant was a confidential source when there may be another ground

why the document should be exempt. Accordingly, the AAT gave the DSS an opportunity to address the unreasonable disclosure of personal information exemption.

### Section 41

Addressing the s.41 exemption, the AAT referred to the two step process involving first the question of whether any disclosure would be disclosure of 'personal information'. Identifying details of the informant were, not surprisingly held to constitute 'personal information'.

The AAT then turned to the second step, that of deciding whether any disclosure would be 'unreasonable'. The AAT referred to the Federal Court *Colakovski* decision in which 'unreasonable' was held to have, as its core, public interest considerations. The AAT referred to the need to balance competing public interest considerations between, on the one hand, ensuring public access to information about government and, on the other hand, protecting individuals against unfairness or embarrassment.

The AAT referred to the DSS's argument that releasing information about informants would 'undermine the current system'. The AAT noted that there was no evidence that such undermining would be likely.

The AAT also noted that there was no evidence to support the claim that the subject of the call may take retribution against the informant.

The AAT noted further that there was evidence before it that the informant did not now (as distinct from the time of making the call) want his or her personal information released.

## Decision

On balance, the AAT concluded that disclosure of the information would be unreasonable. The result was that, while the s.37(1)(b) claim had not been made out, the s.41(1) exemption had been established.

### Section 59A(3)

The obligation under s.59A(3) to inform a person of an AAT application for a review of a decision in relation to personal information had been discharged. The AAT expressed the view, however, that as it was likely that this had been done only by telephone call conveying the specific details of the AAT application, it

would have been preferable that that advice be put in writing.

### Comment

The AAT was critical of the approach of the agency in using the confidential source of information exemption in s.37(1)(b) where the 'no objection' box had been ticked. The AAT's reasons for decision include a quote of some advice given to the internal review officer by Senior Member Dwyer to the effect that that officer should not 'just assume that (he knows) better than the person who filled the form in, without speaking to the person who gave the information'.

[N.D.]

### CORRS CHAMBERS WESTGARTH and COMMISSIONER OF TAXATION (No. V97/968)

**Decided:** 25 September 1998 by Senior Member Dwyer.

**Fol Act:** Sections 38; 40.

**Income Tax Assessment Act 1936:** Section 16(2).

*Information respecting the affairs of another person held by the Australian Taxation Office; Fol Secrecy provision; whether deletion of identifying information is sufficient for the purposes of section 16(2) of the Income Tax Assessment Act.*

### Decision

The AAT varied the decision under review by providing that access be granted to two documents subject to the deletion of material identified as exempt.

### Facts and background

Corrs Chambers Westgarth (Corrs) is a law firm whose Melbourne office was acting for Foster's Brewing Group Limited (FBG). Corrs sought access to a wide range of documents described as 'all reports, working papers, file notes and memoranda in the ATO's possession' in the context of the respondent agency's Tax Strategy Review of FBG.

The decision for review before the AAT was, formally, the internal review made on 10 July 1997 by an officer of the respondent. As a result of a supplementary decision and negotiations between the parties, there were, at the date of the hearing, six documents remaining in

dispute. The AAT decision deals only with those six documents.

Of the six documents (identified as 17, 18, 78, 93, 94 and 105) four had been wholly exempted and a further two had been released subject to the deletion of certain material.

All exemptions were claimed under s.38 (secrecy provision exemption) of the *Fol Act* in association with s.16(2) of the *Income Tax Assessment Act 1936* (ITA).

Reference was made in the AAT's reasons for its decision to a s.40 exemption claim (prejudice to the operations etc of an agency) but no argument or reference to authorities took place at the hearing and the AAT, accordingly, dealt only with the s.38 exemption claim.

### Findings on exemption claims

Much of the AAT's reasons deal with the question of whether the deletion of identifying material would overcome the prohibition in s.16(2) of the ITA which prevents an officer from communicating etc any information 'respecting the affairs of another person'.

Section 38 of the *Fol Act* provides, relevantly to the present case, that a document is exempt if disclosure of the material in question is prohibited under a provision of an enactment which is specified in Schedule 3 of the *Fol Act*. Section 16(2) of the ITA is so specified in Schedule 3. The issue for the AAT turned significantly on its interpretation of s.16(2).

The AAT noted that the words 'respecting' and 'affairs' had been given wide connotations in *Re Mann* (1987) 87 ATC 2010. The AAT also noted that the parties had agreed that the reference to 'information respecting the affairs of another person' applied to information respecting the affairs of a legal person, namely a company, as well as to the affairs of a natural person.

The issue which involved almost all of the AAT's consideration was whether, by deleting all identifying references from the material, it could then be released without breaching s.16(2). The AAT noted there were two 'extremes'. On the one hand, the Mann decision suggested that such deletion could appropriately occur. On the other hand, in that decision the AAT had affirmed that documents in question were exempt because of the 'cardinal principle' of

Australian Income Tax law that the knowledge of a person's affairs gained by the Australian Taxation Office is 'sacrosanct'.

The AAT noted the ambiguity in the Mann decision and went on to conclude that the correct approach was that stated by Deputy President Forgie in *Collie* (1997) 45 ALD 556. In *Collie*, the AAT held that s.16(2) does not require that a person be able to be identified from the information and that it 'is enough that it can be identified as information respecting the affairs of another person'.

Thus, the AAT in the present case applied the principle that as long as it is apparent that information is information about another person, whether or not that person is identified or identifiable, s.16(2) operates to prevent disclosure of that information.

The AAT then proceeded to consider the application for review in respect of each of the six documents. It upheld the total exemption in relation to both documents 18 and 105. Document 18 was a letter from the respondent agency to an unrelated taxpayer about the conduct of an audit. The AAT held that even if names were deleted it would still be possible to identify the information as that respecting the affairs of a company. Document 105 was a private ruling made by the Commissioner. It clearly constituted information relating to the affairs of another person for the purposes of s.16(2).

The AAT also affirmed the decision in relation to the two documents which had been released with exempt material deleted. Document 17 was a document entitled 'Record of Documents Removed from File'. On inspecting the document, the AAT was satisfied that the material deleted was information respecting the affairs of another person. Document 78 was a note to an Acting Senior Assistant Commissioner on a request by a tax agent for advice concerning an unrelated third party taxpayer. The AAT, after inspecting the document, was satisfied that the deleted material was information respecting the affairs of another person.

The two documents in respect of which the AAT varied the decision under review were documents 93 and 94. Document 93 was a copy of a letter generated by a tax

consultant on behalf of a tax payer. The AAT decided that the document could be released provided deletions, including those of the name of the client and the name of tax consultant, were made.

Document 94 was also generated by a financial consultancy on behalf of a client. For reasons similar to those given in relation to document 93 the AAT varied the internal reviewer's decision by providing that the document could be released as long as names of parties were deleted.

Presumably, the material that was released in documents 93 and 94 would have been sufficiently general in nature that it would not be possible, on reading them, to ascertain that any material related to any person.

### Comment

This decision probably says more about s.16(2) of the ITA than it does about s.38 of the *Fol Act*. It is useful, however, because many secrecy provisions are worded similarly to s.16(2).

It is important to note that the *Fol Act* definition of 'personal information' specifically includes the provision that the information must be such that a person's identity is apparent or ascertainable from it. This is in contrast to the provisions of s.16(2) which refers to any information 'respecting the affairs of another person'.

[N.D.]

### FINLAYSON and FAMILY COURT OF AUSTRALIA (FCA) (No. S97/254)

**Decided:** 21 September 1998 by Senior Member Kiosoglous.

***Fol Act:*** Sections 24(1); 56(5); 61.

*Substantial and unreasonable diversion of resources of an agency; assisting applicant to refine the request to remove the s.24(1) ground for refusal; jurisdiction of AAT where agency makes its decision after application has been made to the AAT.*

### Decision

The AAT affirmed the FCA's decision to refuse access on the grounds of substantial and unreasonable diversion of resources.

### Facts and background

Finlayson submitted two different requests on the same day to the Office of Chief Executive of the Family Court. The requests were treated as one single request by the FCA's Fol co-ordinator.

The AAT's reasons for decision do not indicate what documents were sought other than to refer to Finlayson's requesting access to 'certain information'. Elsewhere in the reasons is a reference to a statement by Finlayson during the hearing referring to the 'Court being in communication with a party to a dispute in a matter before it in a judicial capacity ... without the knowledge of other persons to the dispute'.

Whatever the wording of the request may have been, the FCA wrote to Finlayson about a month after receiving the request asking him to provide more specific details. Further details were provided but the request still related to 23 categories of information, apparently set out in five pages.

The FCA subsequently gave notice to Finlayson that it intended to refuse the request on the 'substantial and unreasonable diversion of resources 'provision contained in s.24(1)'. Finlayson was given an opportunity to reodge his request in a form that would remove s.24(1) as a ground for refusal. Further narrowing of the extent of the request subsequently occurred.

Thirty days after the FCA first sought a narrowing of the request, Finlayson applied for review by the AAT on the 'deemed refusal' basis in s.56(1). The FCA subsequently made a formal decision to refuse access pursuant to s.24(1).

### AAT consideration

#### *Jurisdiction*

The AAT first dealt with the issue of its jurisdiction, given that the application had been made on the basis of a deemed refusal and the agency had subsequently, but prior the AAT hearing, made a formal decision. The AAT found that it had jurisdiction to review the decision actually made. This was clear from the words of s.56(5).

#### *Evidence of workload*

The AAT heard evidence from the FCA's Fol co-ordinator that a total of 574 files (63 of which were archived) were identified as containing

material relevant to the scope of the request — and this was *after* the scope of the request had been narrowed.

The AAT also heard evidence that, on the basis of the Fol co-ordinator's examination of randomly extracted files, the processing of the request would take an uninterrupted 346.2 staff days or 69.2 staff weeks. During the course of the hearing, this was reduced slightly to 344.9 staff days or 69.0 staff weeks.

It was also submitted before the AAT that this estimate was conservative bearing in mind that the Fol co-ordinator was experienced in dealing with Fol requests.

The AAT accepted the above evidence.

The AAT also accepted that the consultation requirements of s.24(6) had been complied with. Finlayson had been given notice of an intention to refuse access and had been given the identity of an officer with whom he may have consulted with a view to narrowing the scope of the request. Finlayson had also been given a reasonable opportunity so to consult (there requirements are laid down in s.24(6)(c) and (d)).

Finlayson had submitted that the requirements of s.24(6)(e) which requires the provision to an Applicant 'as far as is reasonably practicable' with any information that would assist the making of the request in a form which might avoid the s.24(1) refusal. Finlayson submitted that that is an 'absolute' requirement. The AAT rejected this on the basis that the words 'as far as is reasonably practicable' qualify that requirement to provide information to assist.

### Comment

This decision is interesting and instructive because of the detail provided by the agency about how it went about assessing the time and resources processing the request would take. The FCA was able to provide detailed evidence of how it made its estimate. The AAT noted in its decision that, while Finlayson queried the figures he was not able to bring evidence of his own to call the estimate or the estimating process into question.

[N.D.]

# RECENT DEVELOPMENTS

## NSW OPPOSITION INTRODUCES FOI BILL

On 5 May 2000 the Leader of the Opposition in NSW introduced into the Legislative Assembly a *Freedom of Information Amendment (Open and Accountable Government) Bill*. The Bill was read a second time.

The Second Reading speech ranged widely quoting Thomas Jefferson, the *Sydney Morning Herald*, Peter Wilenski, the current NSW Deputy Ombudsman and a person described as the 'father' of the 1966 US Freedom of Information Act, Representative John Moss.

The Bill if enacted would create the position of Fol Commissioner as well as imposing some other obligations on agencies.

### *On the plus side of the Bill:*

- The public are entitled to be present at meetings of the board of management of an agency that is a statutory corporation, subject to any regulations that enable them to be excluded (s.12F).
- If the Ombudsman comes into possession of a document or has access to it, as a result of an investigation of an agency's determination, the Ombudsman may give the applicant access to the document (s.52(8)).

### *On the minus side of the Bill:*

- Perhaps the Opposition Leader has yet to hear about the ADT. She certainly didn't mention it in her speech. One would have thought the ADT was relevant to the role of the Fol Commissioner.
- Perhaps the Opposition Leader has not read s.61 of the current *Fol Act*. It places the burden of proof on an agency to justify a determination: the proposed s.59C does the same thing, so the mischief the new section will eliminate is not clear.
- The Fol Commissioner and the Ombudsman may be one and the same person (s.12A) but equally they may not be. The Fol Commissioner is responsible for supervising agencies in their fulfilment of their *Fol Act* obligations (s.12B) and may direct agencies in relation to the obligations under the *Fol Act* (s.12D). But should the Ombudsman decide to investigate an agency or should the ADT make an arrangement under s.39 of the *Administrative Decisions Tribunal Act 1997* is there not the potential for the Fol Commissioner to be placed in a difficult position, if for example an agency can point to the Fol Commissioner as the source of its actions. All the more problematic if Ombudsman and Fol Commissioner are the same person.
- The Bill gives the Fol Commissioner a role in the records management of an agency (s.12E) but no recognition is given to the functions of the State Records Authority created under the *State Records Act 1998*. There is some overlap here.

The proposed powers of the Fol Commissioner are similar to those currently held by the Ombudsman (and the ICAC for that matter which also potentially has an investigatory role) so one wonders why it is necessary to create a new Commissioner, when the Ombudsman's functions could be amended.

We are told in the Second Reading speech why the legislation is necessary:

The task, as I see it, is to regain the public faith in its political institutions. In this sense, the Coalition's freedom of information amendments are also about institution building. These amendments are about rebuilding the public's faith in the Government. The amendments are about encouraging people to take a greater ownership in government. The amendments are about making government a more effective instrument for improving society.

If one wondered whether the Opposition's attitude would be different if it were in government the Leader stated:

However, I make this commitment: Our government will abide by both the letter and spirit of the Freedom of Information Act.

After the Second Reading speech, debate was adjourned. The next State election is in 2003.

[P.W.]

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Email: m.gillespie@law.monash.edu.au

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**Correspondence to Legal Service Bulletin Co-op.,**  
C/- Faculty of Law, Monash University, Clayton 3800  
Tel. (03) 9544 0974 email: L.boulton@law.monash.edu.au