the transparency of prison contracts could be 'used in the consideration of the balance of competing public interests' in the absence of illegality, impropriety or potential wrongdoing: This implies that the public interest in transparency of other 'more commercial' contracts or arrangements could not be used in the balancing process in the absence of such illegality, impropriety or wrongdoing.

This, in my view, places an unwarranted gloss on s.50(4). The public interest in the transparency of 'commercial' contracts and arrangements should be a factor that is 'used' in the balancing exercise even in the absence of evidence of illegality etc. Moreover, that public interest should *prevail* in appropriate circumstances even if disclosure of the information in question would not reveal any such illegality etc. This, it may be noted, is consistent with the position taken in *Re Hulls and Department of Treasury and Finance* (unreported, VCAT, Judge Wood VP, 1 December 1998), where the VCAT ordered the release of documents held to be exempt under ss.34 and 38 of the Act in circumstances where there was no evidence or even any suggestion that their disclosure would reveal impropriety. In that case, the VCAT ordered the release of the documents (which related to the bidding process for the casino licence) to enable members of the public to be placed in a position whereby they were better informed and thus able to promote public debate on a matter that affected them. [Note:The Court of Appeal heard the appeal from the Hulls decision on 24-25 May 1999. At the time of writing, the Court's decision has not been handed down.]

4. *The Tribunal's observation that 'the press is not necessarily illustrative of what is in the public interest':* This observation accords with comments by the English Court of Appeal that the media's interest and the public interest do not always 'march hand in hand' and that the media is 'particularly vulnerable' to confusing the two interests: see *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 at 898.

[J.D.P.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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COLLIE and DEPUTY COMMISSIONER OF TAXATION (No. Q96/410; 45 ALD 556)

Decided: 4 April 1997 by Deputy President Forgie.

FoI Act: Sections 11, 27A, 38, 40, 42.
Income Tax Assessment Act: Sections 16(2), 16(3).
Director of Public Prosecutions Act: Section 6.

Significance of applicant's reasons for seeking access; secrecy provision requirements — operations of Australian Taxation Office — interpretation of applicant's request — judicial notice in respect of the 'operations of an agency' exemption.

Decision

The AAT set aside the deemed decision of the Australian Tax Office (ATO) and substituted a decision that some documents should be released in their entirety and that others should be released with exempt material deleted. Other documents were identified as requiring further consideration arising out of the possible need to consult under s.27A.

Facts and background

Collie was investigated and found to have understated his income for several financial years. He was subsequently convicted of conspiracy to defraud the Commonwealth.

Collie sought access to documents relating to the consideration by the Commissioner of Taxation of certain aspects of his taxation affairs, including those relating to a settlement entered into (and subsequently not complied with by Collie) with the ATO.

Collie received no decision from the ATO within 30 days and this case came on for hearing technically as a deemed refusal. The ATO made a decision after Collie had applied for review under the deemed refusal provisions. At the time, Collie was preparing an appeal in the Supreme Court of Victoria.

Relevant documents

The number and variety of relevant documents were significant. Three parts of a 'Recovery File' and two parts of an 'Audit File' were identified as relevant. There is reference in the AAT's reasons for the decision to a preliminary conference before Senior Member Beddoe in which he indicated which documents he considered might be relevant.

The Deputy President repeated the observation she made in the Russell Island Development case ((1994) 33 ALD 683 at 692) that s.15 of the *FoI Act* gives an applicant a broad indication of how to frame a request. The context of Collie's circumstances may be relevant. The wording of an FoI request should not be interpreted with the same degree of precision as one would approach a piece of legislation.

Significance of reasons for seeking access

An interesting feature of this case was the ATO's submission that Collie had made and pursued the request in order to assist him to prepare his case in a matter in the Victorian Supreme Court. It appears the ATO may have invited the AAT to restrict access under the *FoI Act* on

the basis that Collie would be entitled to the usual discovery and inspection procedures in the course of his Supreme Court litigation.

The AAT rejected this approach. It referred to s.11 which provides that 'subject to (the) Act', a person's right of access is not affected by the agency's belief as to the applicant's reasons for seeking access. Exemptions claimed here under ss.38 and 42 do not have a public interest element, and there is consequently no requirement to consider a public interest in protecting discovery and inspection procedures. As for the public interest test in s.40(2), it would be relevant only if one of the grounds in s.40(1)(a) was made out which was not the case.

Findings on exemption claims

Section 38

The relevant secrecy provision was s.16(2) of the *Income Tax Assessment Act 1936* (Cth) which is referred to in Schedule 3.

The AAT rejected the submission that information 'respecting any other person' must be such as to enable the identity of that other person to be ascertained. Section 16(2) of the *Income Tax Assessment Act* requires only that information can be identified as information respecting the affairs of another person.

Sections 40(1)(c), 40(1)(d) and 40(1)(e)

The AAT found none of the documents exempt on the grounds of substantial adverse effect on the relevant aspects of the operations of the ATO.

Essentially, the respondent's argument was that revealing the names of its officers would have the 'substantial adverse effect'. The AAT, after discussing what constitutes 'substantial adverse effect', concluded that merely releasing names would not have that result. The AAT noted that some of the names had, in fact, already been divulged in affidavit material filed in the Supreme Court of Victoria.

The ATO submitted that, on the basis of observations made by the AAT in re 'Z' ((1984) 6 ALD 673), the AAT should take judicial notice of the fact that Australian Taxation Office officers were named. The AAT held, however, that this would not constitute discharge by the ATO of the onus of proof required by s.61. The AAT observed that the fact of which it was asked to take judicial notice is 'the very issue which the *FoI Act* requires' the ATO to prove.

Section 42

The AAT referred to the fact that legal professional privilege may be claimed in relation to advice by a lawyer employed by the government provided the professional relationship has the necessary quality of independence *(Waterford v Commonwealth* 71 ALR 673). Here, that professional relationship and the quality of independence existed.

The AAT went on to uphold the exemption in respect of some documents after having examined them. Other documents were held not exempt under s.42 because they would not attract legal professional privilege in legal proceedings.

Comment

This decision is straightforward in terms of the exemptions claimed and the AAT's findings on them.

Of particular interest and helpfulness, however, are the observations about reasons for seeking access, interpretation of the wording of a request and the assistance the AAT may be able to give at a preliminary conference (in this case concerning what documents were relevant).

Although this case came on as a deemed refusal, the AAT allowed documents such as the 'T' documents into evidence and generally conducted the hearing as if the ATO's late decision had been the actual decison under review.

[N.D.]

SUBRAMANIAN and REFUGEE REVIEW TRIBUNAL (No. N96/313)

Decided: 30 May 1997 by Deputy President McMahon.

FoI Act: Section 66.

Payment of applicant's costs.

Decision

The AAT recommended the Attorney-General pay Subramanian's costs.

Facts and background

On 6 February 1997 the AAT set aside a decision of the Refugee Review Tribunal (RRT) in favour of the applicant (see (1999) 80 *FoI Review* 34). Subramanian sought to have his costs paid by the Attorney-General pursuant to s.66 of the *FoI Act*.

AAT consideration

Under s.66(1), the AAT has a discretion to recommend to the Attorney-General that the Commonwealth pay an applicant's costs where that applicant is successful or substantially successful in the application for review.

Under s.66(2) the AAT is required to have regard to the four factors discussed below.

Financial hardship to the applicant

The AAT noted it had no evidence of possible impact on the applicant if it were obliged to pay its costs.

The AAT noted that the observations in a 1985 decision on what constitutes hardship (*Re Hounslow*) had been overruled by the Federal Court but that that judgment remains unreported.

Benefit to the general public

The AAT referred to the 1995 Cashman decision which affirmed that the benefit to the general public means there has to be a benefit flowing to the public as a result of the release of the documents.

The AAT found that there was no special benefit to the general public flowing from the release of the documents to Subramanian.

Commercial benefit to the applicant

The AAT found there was no suggestion that Subramanian will benefit commercially one way or the other.

Reasonableness of the decision reviewed by the AAT

The AAT found that the RRT had not, at the decision-making stage, examined each document separately and made a decision on each document irrespective of whether it thought that all documents belonged to a particular class. The AAT acknowledged that such a task is 'not an easy one'.

The AAT said that this criterion alone was sufficient to support the recommendation that the Commonwealth should pay the applicant's costs.

Directions hearing

The only part of the applicant's costs in respect of which no recommendation was made that they be paid related to a directions hearing resulting from an interlocutory application

by the RRT to dismiss the review application for want of jurisdiction. This was because Subramanian also had, at that time, a complaint to the Ombudsman. The AAT decided that the costs relating to this directions hearing were a result of Subramanian's complaint to the Ombudsman and that Subramanian should pay those costs.

Comment

Even though three of the four criteria required to be considered by the AAT under s.66(2) may have operated against the applicant, the AAT was prepared to exercise its discretion to recommend the Commonwealth pay costs on the basis of the fourth, namely failure of the RRT to follow the recommended practice of considering every document on its merits, onerous though this may be.

It is also worth noting that, under subsection 66(1), the AAT recommends to the Attorney-General that the Commonwealth pay the costs. Subsection 66(3) provides that the Attorney-General 'may' authorise the payment of costs to an applicant.

[N.D.]

Recent Developments

The Victorian Parliament is in the last stages of passing the *Freedom of Information (Amendment) Act 1999*. This Act was born out of controversy and provoked reams of Hansard debate.

Under the amendments, a government agency or Minister will decide what is 'personal information', and must delete it from all documents released. The legislation inserts a new s.27A that defines 'personal information' as information:

(a) that identifies any person or discloses their address or location; or

(b) from which any person's identity, address or location can reasonably be determined.

It also inserts a new s.27B that allows for the release of personal information where that information is:

(a) personal information that the applicant already knows or ought to know; or

(b) personal information that the applicant could reasonably obtain (other than as a result of a request under this Act) from documents generally available to the public for inspection or purchase.

The Victorian Attorney-General argues that the 'names of ministers, secretaries of departments and other office holders, which are available on a public register, will not be deleted'.

These amendments allow for the return of the faceless and nameless bureaucrat. The term 'public' in public official, public officer and public servant is not a meaningless and redundant term. It is meant to symbolise the virtue and necessity of exercising public power and public decision making in public on behalf of the public. The amendments also protect companies and business names.

When designing their Freedom of Information Act the Irish government deliberately included provisions that required the release of the names public servants when they were carrying out their normal duties and functions. The Canadian privacy legislation specifically ensures that public officials cannot claim privacy protection when their names appear on public records or documents relating to their official positions and duties. In those two jurisdictions Parliaments have merely codified the VCAT interpretation of Freedom of Information laws and best practice in Australia.

We should start from the basis that all of us on the public payroll, from university teachers to attorney-generals, cannot hide beyond the rubric of 'personal affairs' to keep our names from being released under FoI. We are in a different position from the citizen whose name has been mentioned in some government document who may very well deserve to have their name deleted in an FoI application on the grounds of protecting personal privacy. If the release can be shown as threatening to our personal safety or that of our families then the *FoI Act* offers sufficient protection mechanisms. The device fashioned by the Attorney-General and her advisers, intentionally or unintentionally, allows for the routine cover up of administrative malpractice.

The current provisions of the *FoI Act* more than suffice to protect the legitimate personal privacy of public officials. The Attorney-General has conceded that the Frankston nurses' case could have been decided differently or that more attention could have been given to the legitimate concerns of the nurses in that case.

The convergence of technology and media, the rapidly changing dynamics of policy formulation and the multiplicity of public/private partnerships in service delivery require a fundamental rethink about access to information. There are parliamentarians, including liberals like Victor Perton, who are turning their thoughts to these developments. Yet a knee jerk reaction such as the Premier's in January to the release of the Frankston nurses' names and a cynical manipulation of privacy concerns is not the way the Victorian government ought to be handling this issue.

[R.S.]

Opinion continued from p.37

It seems that the Attorney-General and his cabinet colleagues are quite happy to see the *Freedom of Information Act* fall apart from neglect and the failure to ensure adequate administrative compliance with the legislation.

The two articles in this issue focus on compliance issues raised by the Commonwealth Ombudsman. The first on compliance in NSW and the second on the difficulties faced by journalists who try to use FoI when agencies are quite prepared to produce fee estimates of $110,000.

I urge that compliance audits be undertaken in each Australian jurisdiction.

I hope that the national conference on FoI in Melbourne on the 19-20 August will start to see some action on positive reforms to Australian FoI.

Rick Snell

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