Comment

Nexus between FoI Act and Local Government Act

The ADT dealt with Ms Gilling's quest for information under the FoI Act but noted obligations placed on Councils under the Local Government Act (LGA).

Section 12(1) of the LGA lists publicly available information without the need for an application. Section 12(6) allows inspection of its documents, free of charge, unless it would be contrary to the public interest to do so. Section 12A requires written reasons to be given for refusal and this decision must be reviewed within three months.

The ADT thought the rights under the LGA gave the public greater rights to access than under the *FoI Act*. The problem is that an aggrieved person in relation to the LGA must pursue any remedy in the NSW Land and Environment Court.

The *FoI Act* and the ADT represent a more coherent regime of review of decisions with cheaper and more accessible remedies.The ADT noted:

> 11. Having two separate regulatory regimes for access to Council documents is confusing because the tests for providing access to documents differ. When a person asks for a document, there is nothing to indicate which test should be applied in responding to such a request. If a Council refuses to provide access to a document, the applicant may not be aware that in many cases they have the choice of pursuing the matter under the *FoI Act* to the ADT or under the LGA to the Land and Environment Court.

Quite clearly the two regimes need to be amalgamated.

Memo to the NSW Premier

Sit down with the Attorney-General and the Minister for Local Government and make some decisions to enable the ADT to determine LGA access issues.

If the policy thinking behind the LGA access regime justifies a better scheme of access in relation to Councils then the ADT could be empowered to determine any review decision on the basis of whichever test would give greater access, irrespective of whether the application was made under the LGA or the *FoI Act*.

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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[N.D.]

OSET and AUSTRALIAN INDUSTRIAL REGISTRY (No. W96/359)

D cid d: 26 February 1997 by Deputy President Breen.

FoI Act: *Section 6; Schedule 1.*

Jurisdiction of AAT — documents in possession of Australian Industrial Relations Commission Registry.

Decision

The AAT has no jurisdiction to hear an application for a review of a decision under the *FoI Act* to refuse access to documents in the possession of the Australian Industrial Relations Commission (AIRC) which relate to issues raised in the course of proceedings before the AIRC, and whose character is probative in respect of those issues. Documents whose character is probative in respect of an issue before the AIRC are not documents of 'an administrative nature' for the purposes of s.6 of the *FoI Act*.

Facts and background

The applicant sought access to documents on the file of the Registry of the AIRC. Oset was a party to proceedings in the AIRC relating to her perceived grievance against her former employer.

The AAT decision is very short and does not contain any details of the background to the application. The decision deals only with the question of jurisdiction.

The AAT asked Oset two specific questions:

- was it Oset's perception that the AIRC held documents relating to issues raised by her in the course of proceedings she had initiated in the AIRC; and

  were the documents held by the AIRC probative of the issues before it?

Oset answered 'yes' to each question.

The AAT decided on this basis that it had no jurisdiction to compel the AIRC to provide to parties to proceedings, copies of documents of evidential quality and character which have come into the possession of the AIRC in the course of the performance by it of its statutory role.

The AAT relied on s.6 of the *FoI Act* which provides, among other things, that tribunals, authorities or bodies specified in Schedule 1 are deemed to be 'prescribed authorities' but that the *FoI Act* does not apply to any request for access to documents in their possession unless the documents in question relate to matters of an administrative nature.

In Oset's case, while the AIRC is a prescribed authority (and therefore subject to the *FoI Act* generally) it is so only in relation to documents of an administrative nature and not to documents whose contents go to the resolution of matters in dispute between parties.

Comment

This decision and provisions such as s.6 (and also s.5) of the *FoI Act* are consistent with the philosophy behind the *FoI Act* of maximising access rights to official documents of

agencies and to assist the public in understanding administration generally. The documents sought by the applicant in this case would, presumably, have thrown no light on the administrative processes of the registry of the AIRC. Indeed, her motive for seeking access presumably had nothing to do with administration as such.

HOWARD and ENVIRONMENT AUSTRALIA (BOWMAN BISHAW GORHAM and ADAM, parties joined) (No. W96/315)

Decided: 19 May 1997 by Deputy President Barnett.

Fol Act: Sections 43, 45.

Reviews of an environmental report — whether information in a scientific report constitutes business, commercial or financial affairs; breach of confidence.

Decision

The decision to exempt the documents was set aside. The AAT found that the exemption claims had not been made out.

Facts and background

The facts of this case relate to the controversial proposal by Cedar Woods to develop 30 hectares in the Creery Estate.

Cedar Woods had commissioned Bowman Bishaw Gorham (BBG) to produce an environmental report. The report had been sent to the Minister for the Environment.

Environment Australia (formerly Australian Nature Conservation Agency) had commissioned three reviews of the report to be written.

Howard sought access to those three reviews. Both the initial decision maker and the internal reviewer decided that the three reviews were wholly exempt documents under ss.43 and 45.

Findings on exemption claims

Section 43(1)(c)(i)

To succeed under this exemption an agency must demonstrate that disclosure would, or could reasonably be expected to, unreasonably affect a person or business in respect of lawful business, commercial or financial affairs.

The AAT found that this exemption had not been made out.

The information contained in the three reviews concerned environmental values of the land in question. The reviews were confined to a critical scientific assessment of BBG's professional report on those matters.

The AAT considered the contents of each document. It found that the reviews were only mildly, if at all, critical of the contents of the BBG report. There was no evidence that any adverse comments about the report were not true and, consequently, there was no basis on which disclosure might 'unreasonably' affect BBG in the pursuit of its business affairs.

Section 45(1)

The AAT was satisfied that disclosure of any or all of the documents would not found an action by a person other than the Commonwealth for breach of confidence. The AAT applied the criteria set out in the *Kamminga* decision ((1992) 40 *Fol Review* 48). It found that the contents of the reviews did not have an inherent quality of confidentiality. None of the reviewers expected his review would be treated as confidential by Environment Australia. In fact they knew the content of their reviews would probably be made known to the Minister for the Environment. There was, moreover, no evidence that any of the reviewers would suffer any detriment if the reviews were disclosed.

WESTERN DESERT PUNTUKURNUPARNA and ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION (ATSIC) (No. W96/235)

Decided: 18 June 1997 by Deputy President Barnett.

Fol Act: *Sections 40, 45, 56.*

Deemed refusal to grant access to a document; solicitor/client duty; breach of confidence; 'Kamminga' criteria; meaning of to 'found an action'; prejudice to effectiveness of operations of an agency.

Decision

The AAT affirmed the deemed decision to refuse access to the document. The document was exempt under s.45(1) only, the s.40(1)(a) claim not being made out.

Facts and background

The applicant, Western Desert Puntukurnuparna (WDP) sought access to a letter which had been sent to the respondent ATSIC, by a formerly employed (by WDP) solicitor. The solicitor had been dismissed by WDP at about the time the letter was sent. It is not clear from the reasons for decision whether the solicitor was employed by WDP at the time the letter was sent.

The solicitor's letter contained complaints about the administration and financial affairs of WDP and the manner in which it was proceeding in the preparation of a Native Title claim.

WDP had not received a decision after the expiration of the 30-day deadline which had been extended by a further 30 days pursuant to s.15(6). WDP, accordingly, made its application to the AAT pursuant to s.56(1) — that is, a 'deemed refusal'.

Findings on exemption claims

At the hearing, ATSIC claimed exemption under s.40(1)(a) and s.45(1).

Section 40(1)(a)

The AAT found that the document was not exempt under s.40(1)(a) because its disclosure would not be likely to prejudice the means by which ATSIC can effectively conduct audits.

In deciding whether release of the solicitor's letter would, or could reasonably be expected to, prejudice ATSIC's conduct of its tests, examinations and audits etc, it had to consider two conflicting principles:

- the public interest in protecting the anonymity of 'whistle blowers'; and
- the public interest in protecting the sanctity of the solicitor/client relationship.

Public interest is relevant because of the provisions of s.40(2).

The AAT decided in favour of protecting the sanctity of the solicitor/client relationship by holding that the exemption did not apply. The AAT considered that by not protecting the 'whistle blowing' solicitor it would not be likely to prejudice ATSIC's procedures because other 'whistle blowers' would be unlikely to be discouraged unless they were solicitors who were prepared to breach the solicitor/client relationship.

Section 45(1)

The AAT found that the document was exempt under s.45(1).

The AAT was satisfied that disclosure of the solicitor's letter would 'found an action by a person other than the Commonwealth, for breach of confidence'.

The AAT applied the criteria in the *Kamminga and ANU* decision (1992) ((1992) 40 *FoI Review* 48) as set out below:

> both ATSIC and WDP agreed on the existence of the particular document and the nature of its contents;
>
> the contents of the letter had an inherent quality of confidentiality;

- ATSIC received the letter in such circumstances as to import an obligation of confidence; and
- there was an actual threatened misuse of the information which would occur on disclosure of it.

Meaning of to 'found an action'

It was argued by WDP that the solicitor could not found a breach of confidence action because he had already breached his solicitor/client obligation by divulging the information contained in the letter. He would therefore, it was argued, not come to the breach of confidence action with clean hands and it was therefore unlikely that a court would uphold such an action.

The AAT rejected this submission on the basis that the words 'found an action' in s.45(1) refer only to setting up or establishing a basis of such an action. Likelihood of success or failure is not relevant.

Comment

The AAT's rejection of the s.40(1)(a) claim on the basis that the effectiveness of ATSIC would not be compromised may be considered artificial in light of the fact that the document was held to be exempt for other reasons.

The net effect of this decision is that WDP was denied access to the document on the basis of a technical interpretation of s.45. While it is arguably correct that consideration of possible success of a breach of confidence action was irrelevant, WDP may nevertheless consider itself unfortunate not to have been granted access to a letter about it by its former solicitor to a third party.

[N.D.]

FoI archives

Greg Terrill has a personal archive related to the issues of secrecy and openness in the federal government since World War II. The material has been used to write a PhD, a book *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (forthcoming, early 2000, Melbourne University Press), another co-edited *book Open Government: Freedom of Information and Privacy* (Macmillan, UK, 1998), and a number of articles.

Some keywords that describe the contents include concepts such as: secrecy, open government, leaks, privacy, freedom of information, propaganda, government publicity, archives, democracy, rights to know, administrative law; as well as organisations such as the Department of the Media and the Royal Commission on Australian Government Administration. There are also holdings on a number of key individuals — Gough Whitlam, Jim Spigelman, Paul Munro, Clyde Cameron, and so forth. Most of the archive relates to federal government activities. The focus of the archive is the years 1970-76, though it covers the post-war period more broadly. During this period the holdings cover most working days.

The material has been assembled from books, media sources, personal holdings of documents, and closed and open archival collections.

The archive is indexed (in a rather personal, idiosyncratic manner), and comprises 25 large arch files (arranged chronologically), a filing cabinet and more of papers (organised thematically), and a large collection of books and official publications.

Other researchers are most welcome to use the archive. Please contact Greg by email: gterrill@yahoo.com

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