FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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[N.D.]

SULLIVAN and DEPARTMENT OF INDUSTRY, SCIENCE AND TECHNOLOGY and AUSTRALIAN TECHNOLOGY GROUP PTY LTD (No. A95/17)

D cid d: 6 June 1997 by Senior Member Peter Bayne.

Fol Act: *Sections 11, 42, 45.*

Minutes of company directors' meetings; information disclosed at private arbitration proceedings; waiver of legal professional privilege; 'Fairfax' doctrine in relation to publicly held confidential information.

Decision

The AAT varied the decision under review by holding nine documents not exempt and affirming exemptions claimed by the respondent in relation to another three documents.

Facts and background

Sullivan was associated with a company called Sultech. Sultech was engaged by the Australian Technology Group Pty Limited (ATG) which had been set up in 1992 by the Commonwealth Government to capitalise on Australia's research strength in order to contribute to a stronger and more competitive economy.

ATG was funded jointly by the Commonwealth and private enterprise. In performing its duties under its contract with ATG, Sultech set up a series of briefings. A dispute arose between ATG and Sultech which was the subject of private arbitration proceedings.

Sullivan sought access to documents in the possession of the (then) Department of Industry, Science and Technology (DIST).

Threshold question: documents in the possession of an agency

ATG, being an investment company, was not an 'agency'. DIST provided administrative and clerical support for ATG. In this capacity, it held documents created by ATG.

On 26 April 1996 the AAT held that the documents sought by Sullivan were documents in the possession of DIST on the basis that DIST had physical possession of the documents. This decision is reported at 23 AAR 59; (1998) 75 *Fol Review* 44.

The present AAT decision deals with the issues of the exemptions claimed by DIST in response to Sullivan's FoI request.

Relevant documents

The more significant documents which were the subject of the AAT review were:

- three copies of minutes of ATG directors' meetings;
- correspondence from ATG to its British counterpart seeking information for submission to ATG's lawyers;
- draft statement explaining ATG's position in relation to its dispute with Sultech; and
- document addressing consequences of ATG's failure to mitigate losses.

There were also a number of letters to which copies of the above documents formed attachments.

Findings on exemption claims

Only two grounds of exemption were claimed by the respondent agency. They were legal professional privilege (s.42) and material obtained in confidence (s.45).

Minutes of ATG's Directors Meetings

The AAT rejected both the ss.42 and 45 claims. None of the three copies of directors' minutes was exempt.

The AAT noted that the copies of minutes had been submitted in evidence at the private arbitration hearing. The effect of this was to constitute waiver by ATG of any privilege which might otherwise have been available.

Although the arbitration was private, and the applicant had agreed to use the information contained in the minutes only for the purposes of the arbitration and not beyond, there had been no agreement between the parties that the confidentiality had been waived.

The AAT rejected a submission by the applicant that the fact that DIST had placed its copies of ATG's directors minutes on unclassified files indicated also that confidentiality had been waived. The AAT relied solely on the fact that the minutes had been placed in evidence in the arbitration.

The AAT also considered the 'Fairfax' doctrine which recognises a difference in character between private confidentiality and the confidentiality attaching to publicly held documents. In relation to the publicly held documents, there is a public interest in release element to be considered. Balancing ATG's capacity to perform its public function and the public interest in not maintaining confidentiality, the AAT decided in favour of disclosure of the documents.

One of the three copies of minutes contained material obtained solely for the purpose of obtaining legal advice. This would have been held exempt but for the fact that this set of minutes, also, had been placed in evidence in the arbitration hearing.

The AAT rejected, however, an argument by Sullivan that merely by giving the document to DIST, ATG had waived legal professional privilege. Again, the AAT relied solely on the placing of the document into evidence to indicate waiver of privilege.

Correspond nce between ATG and British counterpart

ATG had written to its British counterpart seeking information to put to its own lawyers. The legal professional privilege claim was rejected by the AAT because the letter had not been written for the 'sole purpose' of obtaining information.

Draft statement explaining ATG's position

Although a draft statement explaining ATG's position had been produced for the sole purpose of the arbitration, the fact that it was placed in evidence in that arbitration meant that potential legal professional privilege was lost. The document was not exempt.

Document addressing consequences of ATG's failure to mitigate loss

ATG produced a document addressing consequences of its failure to mitigate its losses. This was sent under covering letter to several of its advisers.

This document was held to be exempt because it had been created for the sole purpose of seeking legal advice.

Covering correspondence to several advisers was held partly exempt in relation to those parts of the correspondence which reflected the contents of the exempt document.

Comment

This decision is significant because the AAT rejected a number of exemption claims in relation to documents of a body which was not an agency. The true significance of this decision emerges when considered together with the earlier *Sullivan* decision ((1998) 75 *FoI Review* 44) which held that physical possession of documents is sufficient to attract FoI jurisdiction.

The decision is also significant for the observations made about waiver of legal professional privilege in relation to the placing of documents in evidence in arbitration.

[N.D.]

SULLIVAN and DEPARTMENT OF INDUSTRY, SCIENCE AND TECHNOLOGY (DIST) (No. A95/157)

Decided: 20 March 1998 by Senior Member Peter Bayne.

FoI Act: *Section 66.*

Payment of applicant's costs.

Decision

The AAT recommended the Attorney-General pay Sullivan's costs of $29,216.85 which related to his costs of AAT review but not those of the FoI application or internal review.

Facts and background

On 6 June 1997 the AAT set aside a decision of the DIST and found that the bulk of documents claimed to be exempt were not exempt and should be released to Sullivan. Sullivan 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 that Sullivan had placed before it material concerning his assets and income. The AAT did not provide those details in its reasons because of privacy interests of Sullivan but noted that it was satisfied with Sullivan's honesty.

The AAT concluded that having regard to the magnitude of the legal costs incurred by Sullivan, he would suffer 'some financial hardship'.

DIST agency submitted that hardship was a strong word which 'requires exceptional circumstances'. The AAT rejected this as an unwarranted gloss on the words.

The AAT decided that on the evidence available to it payment by Sullivan of his own costs would press with 'particular asperity' upon Sullivan.

Benefit to the general public

The AAT considered it was bound by the decision in *Cashman* in 1995 ((1995) 56 *FoI Review* 28; (1997) 68 *FoI Review* 31). The question is whether the general public has benefited from the fact that information previously withheld is now accessible to the community.

The AAT considered that the documents released would not contain material which would be of much interest to the public, but against this was the possibility that it may be of public interest to see that an individual receives justice.

On balance, the AAT found that it should exercise a discretion unfavourable to Sullivan on the question of benefit to the general public.

Commercial benefit to the applicant

Sullivan asserted to the AAT that he would not derive any commercial benefit. DIST made no comment on this assertion. In the circumstances, the AAT found that it should exercise its discretion in favour of Sullivan.

Reasonableness of the decision reviewed by the AAT

The decision whose reasonableness is to be considered is the decision made on internal review and not any later decision to disclose documents prior to the AAT hearing.

The AAT considered the meaning of 'reasonable' and referred to several authorities:

- where there is a requirement that there be 'reasonable grounds' for a state of mind, what is required is the existence of facts which are sufficient to induce that state of mind in a reasonable person;
- there is a difference between asking on the one hand whether something is 'reasonable' and on the other hand whether it is 'not unreasonable'.

The AAT's treatment of this question reflected the difficulty in laying down precise guidelines as to what constitutes 'reasonableness' of a decision. In the final analysis it came down on the side of DIST agency whose internal review decision was considered reasonable in all the circumstances.

Conclusion

Although the AAT found in favour of Sullivan on only two (financial hardship and no commercial benefit) of the four criteria, that was sufficient to cause it to recommend, on balance, to the Attorney-General that the costs of Sullivan be paid.

Other issues

Proceedings

The fact that the legislation provides for the recommendation to be made in relation to 'proceedings' means that no recommendation can be made in respect of costs incurred at the initial FoI application or internal review stages. 'Proceedings' refers only to proceedings in the AAT. As a result, the costs related to the AAT review could be made the subject of a recommendation to the Attorney-General but not other costs.

Whether full costs should be paid

The AAT noted that quite some time was taken over the two-day hearing to deal with an application and submissions by Sullivan that Sullivan's counsel should be allowed direct access to the documents at issue.

The AAT held, however, that the evidence taken in the course of dealing with that application was directly relevant to the arguments going to the exemption provisions. There was, therefore, no waste of time attributable to Sullivan which would cause the AAT to recommend to the Attorney-General that something less than the full amount be paid.

Self-represented applicant

Sullivan in this case represented himself. The AAT had to consider, in that context, whether items for photocopying, an ASC search fee, car travel and parking fees should be allowed. The AAT allowed only the photocopying and the ASC search fee. Had Sullivan been represented, such costs would have been incorporated within the usual concept of legal costs. Reimbursement for car travel and parking fees would not have been and were, therefore, not allowable in this case.

Comment

The question of recommendation that the Attorney-General pay an applicant's costs does not often arise. Senior Member Bayne deals very thoroughly with the issues involved here. This decision is therefore a good reference point if the question of a recommendation to the Attorney-General should arise.

Note also that the AAT's power is recommendatory only. Under s.66(3) the Attorney-General 'may' authorise the payment of costs to an applicant, but it is discretionary.

[N.D.]

RECENT DEVELOPMENTS

FoI Conference: An outsider's perspective

The second half of the current academic year marked the final phase of my undergraduate degree at Victoria University initiating my semester long work-placement at the Communications Law Centre. I knew very little about freedom of information (FoI) legislation or organisations such as the Communications Law Centre when I was invited to attend the 'Freedom of Information and the Right to Know Conference' put together by the Communications Law Centre and the Australian sector of the International Commission of Jurists.

Thursday, 18 August 1999 saw the Sheraton Towers Ballroom in Melbourne full of legal practitioners, FoI officers, representatives of various NGOs and the odd journalist. Everyone seemed to know each other, excluding me, so I retired to the program guide as one usually does in such circumstances. A quick scan showed the topics of concern, centering on the community's right to know, access to information and openness, with a focus on FoI law and international developments.

The international component was spearheaded by Maurice Frankel, the Director of the UK Campaign for Freedom of Information, who covered the plight of FoI in the UK. In reality there is no plight, as the Bill is yet to be passed, and this was the essence of his lecture — an informative whinge about the struggles encountered in establishing FoI against the UK's culture of secrecy.

Maurice Frankel stated that armed with FoI the opposition, pressure groups and journalists can create caution on the part of government forcing it to better serve the community at large. From this moment a recurring theme first showed its face — one of struggle, of fighting heavy odds, of war. Frankel had the ability to link humour and information, a quality shared with many other speakers.

Next to take the podium was Professor Alasdair Roberts of Queens University Canada where FoI is a reality, or is it? Interestingly, he also spoke about government resistance to FoI and the methods employed to constrict its influence. One technique used is changes in administration policies. Altering administration policies does not attract public attention in the way that altering the law does. He stressed that the FoI fight was as crucial now as ever, but the type of fight had changed.

The Internet came in for its fair share of attention from Victor Perton, a Victorian MP. He argued that FoI had not lived up to its intended purpose but the Internet would change everything. He was followed by Roger Clark who also believed the Internet could change everything, but for the worse. Both entertained and informed and to some extent warned what tomorrow may bring.

The next session focused on the classification of cabinet documents. It was very apparent that those involved in this session had genuine concern for the community at heart. They cared, and one could identify that through the passion with which they spoke. They were effectively the watchdogs of democracy. Again the concept of war resurfaced, as Chris Finn of the University of Adelaide argued that the problem was they were fighting a superior force — the government — in the open ground, making them easy targets.

The final session dealt with journalists and their use of FoI. They seemed to appreciate the *concept* of FoI, but argued that the process was slow and difficult. Instead they tended to rely on a phone call to the right person. The entire session focused on re-establishing the relationship between FoI and journalists, using the success of the US experience — portrayed as the Nirvana of FoI — as a backdrop.

I found the Conference most impressive. I took away the notion that we are indeed privileged to be living in a democracy, but the responsibility, nay mandate of exercising that right, is crucial to its success. It is reassuring that individuals of such calibre are working and struggling for a cause so noble. However, I did not see the flip-side of that coin. Perhaps the government and private enterprise are also feeling the heat.

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