that secrecy provision was specific enough for the purposes of s.38 of the Act. Accordingly, it found that the documents were exempt under that section.

Section 50(4)

The Tribunal held that the public interest did not require the release of the documents in dispute. It noted that disclosure of those documents, whilst having potential adverse consequences, would not significantly contribute to public accountability.

Comment

The precise meaning of the phrase 'in a particular instance' in s.31(1)(a) of the Act is not free from doubt. It is unclear whether the phrase should be interpreted as requiring the identification of a particular *area, facet or aspect* of the administration of the law, or whether it should be interpreted as requiring the identification of a single specific *case or instance* of such administration.

In this case, the Tribunal implicitly favoured the former approach because it found that the administration of the prison system — which is an area, facet or aspect of the administration of the law — was a particular instance for the purposes of s.31(1)(a). This conclusion is consistent with the decision in *Re Clarkson and Department of Premier and Cabinet* (unreported, the AAT, Judge Duggan P, 29 March 1990) at 18-19.

[J.D.P.]

WOODFORD and DEPARTMENT OF HUMAN SERVICES (No. 1998/23696)

Decided: 24 November 1998 by Presiding Member Davis.

Section 39 (amendment of personal records) — Section 55 (onus of proof).

Factual background

On 21 March 1997, the respondent Department of Human Services (DHS) released certain documents to Woodford pursuant to a request made by her under the Act. Amongst these documents was a file note taken by a former officer of the DHS. The file note recorded that Woodford spoke to the officer on three occasions on 29 April 1994, and that she used foul language during those conversations. Woodford maintained that she only spoke to the officer twice and that she did not use any foul language.

Procedural history

Woodford requested the DHS to amend the file note pursuant to s.39 of the Act. The DHS refused to do so but agreed to put a memorandum attached to the file note recording Woodford's version of events. Woodford was not satisfied with this course of action and applied to the Tribunal for a review of the DHS's decision to refuse to amend the file note.

The decision

The Tribunal affirmed the DHS's decision.

The reasons for the decision

The Tribunal held that the parts of the file note that recorded that Woodford used foul language related to her personal affairs. After examining the evidence, the Tribunal concluded that the contents of the file note were a true and correct representation of three telephone conversations that took place on 29 April 1994 between Woodford and the DHS officer. Accordingly, the Tribunal affirmed the DHS's decision.

Having reached this conclusion, the Tribunal did not find it necessary to decide the 'difficult but interesting point' as to who bears the onus of proof in relation to an application for review of a decision not to amend a record pursuant to a request made under s.39 of the Act. Compare *Re Atkins and Victoria Police (1999)* 82 *FoI Review* 64, where it was held that the applicant bore the onus of proof in such cases.

[J.D.P.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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[N.D.]

PEAKE and RESERVE BANK OF AUSTRALIA (No. V96/363)

Decided: 24 June 1997 by Deputy President McDonald; Members D. Elsum and C. Woodard.

FoI Act: *Sections 7(2); 43(1)(b); 43(1)(c); Schedule 2 Part II.*

Reserve Bank Act: Part V *Documents relating to Reserve Bank's commercial business in marketing of numismatics products; business affairs of numismatics dealers.*

D cision

The decision under review was affirmed by the AAT except insofar as the respondent Reserve Bank was not entitled to rely on exemptions claimed under the provisions of s.7(2) and Schedule 2 Part II.

Facts and background

Peake is a bank note collector.

The Reserve Bank, in addition to being the banker and financial agent of the Commonwealth also carries on a commercial numismatic business. The Bank sells it numismatic products predominantly to numismatic dealers but also sells a small proportion of such products directly to individual collectors (of whom Peake is one).

Peake requested information and access to nominated documents arising from the period covering 1988 to 1995.

Peake's interest in obtaining information and documents arose out of his seeking to challenge the method of operation of the Reserve Bank in relation to the way in which it carries on its commercial numismatic business. He was apparently concerned at the way in which the Reserve Bank, having a monopoly of bank note production in Australia, wholesales its products to numismatic dealers who then sell them in the secondary market to collectors (such as Peake).

The Bank initially, without identifying the documents concerned, refused access to all documents relevant to the request. Peake then requested that each document he was seeking be identified by the Bank. Although his subsequent request for internal review was not acted upon by the Bank, a further letter to the Bank was treated as an internal review request and the decision was made to release some documents with deletions under s.22. Further documents and information sought by Peake were subsequently released.

At the review by the AAT there were 11 documents, or categories of documents, in dispute.

The exemptions claimed by the Bank were those under ss.43(1)(b) and 43(1)(c). The Bank also relied on s.7(2) and Schedule 2, Part II.

Findings on exemption claims

Section 7(2) and Schedule 2 Part II

The AAT found that documents relating to the issuing of currency are not a 'banking operation' for the purposes of Schedule 2 Part II. The Reserve Bank was therefore not an exempt agency for the purpose of documents concerning bids from numismatic dealers for bank notes and documents generally concerning the supply of bank notes.

Sections 43(1)(b) and 43(1)(c)

The documents in respect of which the AAT had to decide on exemption claims included a letter from the bank to a dealer accepting a bid for the purchase of notes; a letter from the bank setting out conditions upon which the Bank offered an incentive sale proposed to be issued at a coin fair; lists of names and addresses of those who attended a coin fair and of those who purchased notes and coins; a summary of sales of sheets, half sheets and blocks of notes; correspondence and reports relating to a survey by the Bank for the purpose of future marketing strategy; a printout of bids by dealers who were tendering for a particular issue; and a document setting out amounts received from an anniversary issue in 1994.

Most of the above documents had been partially released to Peake — that is the documents were provided but with deletions of material for which exemption claims were made. The AAT's findings on those exemption claims are set out below. Names on sales sheets of dealers who purchased notes, and the prices paid by the dealers, were exempt under both s.43(1)(b) and s.43(1)(c).

Correspondence and reports relating to a survey conducted by the Bank on which marketing strategy was developed was exempt in its entirety. The AAT was satisfied that the provisions of the s.43(1)(b) exemption had been made out. The AAT's reasons for decision do not make it clear whether it also accepted the Reserve Bank's claim for exemption under s.43(1)(c)(i).

Names of dealers and prices paid on a printout of individual bids by dealers were held to be exempt by the AAT under both ss.43(1)(b) and 43(1)(c). The AAT expressly referred to the fact that the dealers regarded the information as confidential as the basis for accepting the s.43(1)(c) exemption.

Details of quantities and prices paid for notes actually purchased were exempt under s.43(1)(b) only. The AAT accepted that divulging the purchase price would enable dealers' competitors to assess those dealers' profitability.

Information of the amounts received from dealers/purchasers and their identities in a document concerning amounts received from a 1994 anniversary issue were held to be exempt under s.43(1)(b).

Details of numbers of notes purchased, categories, prices and times of payment contained in a letter from the Bank in January 1989 to a particular dealer were held to be exempt under s.43(1)(c). Although the prices were contained in a document which was almost eight years old at the time of the AAT hearing, the Tribunal noted in particular that confidentiality was understood to be involved in the dealing and, moreover, the particular dealer had given evidence that he still had some of the stock unsold.

Details of the identities of those who attended a 1990 coin fair, including the prices paid for a particular five dollar note, while not exempt under s.43(1)(b) (the AAT said they had no current commercial value), were held to be exempt under s.43(1)(c) because it was accepted that such information was confidential to the dealers.

Comment

An interesting feature of this decision is the significance of expectations of confidentiality in relation to the s.43(1)(c) exemption. Where information no longer has commercial value s.43(1)(b) obviously cannot apply. But the s.43(1)(c) exemption did apply in a couple of instances because of the importance of confidentiality to the dealers who gave evidence.

The AAT also mentioned that there is no need for an applicant to give reasons for wanting access to documents.

The AAT also observed that the Reserve Bank had answered certain questions of the applicant even though there is no requirement for it to do so under the *FoI Act* which concerns itself, of course, with the access to documents.

[N.D.]

SHARPLES and DEPARTMENT OF EMPLOYMENT, EDUCATION, TRAINING AND YOUTH AFFAIRS (DEETYA)
(No. Q96/281)

Decided: 6 August 1997 by Senior Member K. Beddoe.

FoI Act: *Sections 24(1); 24A; 42.*

Evidence Act: *Section 118.*
Legal professional privilege; documents no longer in existence.

Decision

The decision under review was affirmed by the AAT which was satisfied that, on the balance of probabilities, the documents sought no longer existed.

Facts and background

Sharples sought access to documents in connection with an application made by Kash Management Services Pty Limited (Kash) in May 1993 under the Employer Incentive and Job Train Funding Scheme (EIS). Sharples referred to his Job Train applications, correspondence,

minutes of departmental meetings and reports by departmental officers to consider his Job Train applications.

It appears that Sharples was looking for particular documents which he knew, or believed, to exist.

At the initial decision stage, DEETYA granted access to some documents but refused access to three unspecified documents claiming the legal professional privilege exemption under s.42.

At internal review, DEETYA affirmed this decision but also relied on s.118 of the *Evidence Act 1995* to establish legal professional privilege.

AAT h aring

On conclusion of the hearing, the AAT invited the parties to put written submissions to it. Sharples provided no written submission, although DEETYA did. The AAT decided the case on the materials before it.

Sharples examined DEETYA's files. When he indicated at the hearing that the particular documents he was seeking were not on the files, the AAT adjourned the proceedings to enable DEETYA to conduct further searches for the documents. At the resumed hearing, evidence was provided by DEETYA to the effect that the documents had been lost or destroyed.

The AAT held that s.24A, rather than s.24(1), applied.

The question of legal professional privilege, though claimed by DEETYA and apparently not agreed to by Sharples, was not in issue before the AAT.

Comm nt

The specific details of the documents Sharples thought existed are not made clear in the reasons for the decision.

The AAT seemed to think Sharples' assumption that they did exist was reasonable but did not make any comment on the circumstances of their disappearance or destruction.

[N.D.]

Recent developments

RECENT DEVELOPMENTS IN QUEENSLAND, WESTERN AUSTRALIA AND THE COMMONWEALTH

Introduction

The Western Australian Information Commissioner, the Queensland Information Commissioner and the Commonwealth Ombudsman have all recently released their annual reports for 1998–99, which provide an overview of their operations and highlight the importance of the role of external review in FoI legislative and administrative schemes. Each report identifies problems in alleviating the backlog of cases and renewed attempts to improve the timeliness with which complaints are dealt with. There is also a common emphasis on the role of mediation and conciliation as an alternative to formal dispute resolution, the aim being to reduce the time and expense faced by participants in the review process.

Though the Report of the Commonwealth Ombudsman has a less specific focus on the operation of FoI legislation at the Commonwealth level, its detailed analysis of the administrative structures of some key Commonwealth agencies nevertheless provides a useful contextual basis to assess the role of FoI in general corporate management. The Ombudsman's Report also raises the issue of contracting out, which is of increasing relevance to the scope of application of FoI.

The Queensland Report highlights the need to avoid an unduly legalistic approach to the application of FoI legislation, while the Western Australian Report reiterates that although recommendations for legislative reform have been made in previous reports, there have been no such changes made, the only amendments being to extend the range of exempt documents. The Western Australian Report is particularly progressive in that the Commissioner suggests a 'rethink' of design principles for FoI legislation in order to better enhance contemporary public administration, and contains acknowledgment that reforms must address the interaction between FoI and privacy legislation. However, neither of these suggestions is further articulated within the Report.

Statistics

Differences in format between the respective reports makes a comparison of data cumbersome. However, some common statistical information can be identified (*see Table 1 on the next page*),

Western Australian Information Commissioner's Report

The Western Australian Report offers a refreshing and easy to read appraisal of each relevant agency with respect to the way in which FoI requests and complaints are handled, and includes a brief summary of the main agency functions. The 'report card' approach facilitates an assessment of each agency according to various criteria such as:

- timeliness and costs involved in processing a request;
- the way in which agencies manage data and perform record searches;
- the manner in which decisions are made and the adequacy of reasons given for those decisions; and
- an overall assessment of the 'responsiveness and openness' of the agency's administrative framework.

The 'reports' for 1998–99 were generally positive — for example, the Report highlighted the way in which computerised tracking systems could be used to facilitate data checks and revealed that the preparation of 'Information Statements' by agencies can clarify their operation and the type of information held.

However, there have been problems in practical application of the legislation. For instance, it was noted that the Ministry of the Premier and Cabinet had installed no means by which to formally evaluate the effectiveness of their FoI procedures nor did their 'information statement' identify in detail the categories of documents held. The Commissioner noted that the Ministry was re-evaluating its classification system. Further, the Commissioner noted that the reasons given for decisions by the Ministry for Planning were often insufficient and that the rate of refusal to allow access to documents has increased with