cial business. The Tribunal then considered the broader submission that on the grounds of equity the confidentiality provisions of the *Fol Act* do not apply to government or public bodies when they relate to public issues of areas which concern dealings with public moneys. In arguing this the applicant referred to a decision of Mason CJ in *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* 32 ALR 484. The Tribunal held that the decision was not relevant to the application of the *Fol Act* and did not have the effect submitted by the applicant.

The Tribunal was satisfied on the evidence that the material had been communicated in confidence. It then considered whether the information would be contrary to the public interest in impairing the ability of the police to obtain similar information in the future. In relation to the information from the Law Institute the Tribunal held that there was no reasonable likelihood that such advice would not be provided to the respondent by the Law Institute in the future. The respondent then argued that if it affected other persons in the position of the Law Institute then that was sufficient to find that it would impair the ability of the respondent in the future. On considering the authorities, the Tribunal held that the likelihood of a public body such as the Law Institute being affected by this disclosure was remote and thus not sufficient for the test under s.35(1)(b) of the Act.

The Tribunal then considered the public interest in the event that it was wrong on the above point and held that there was a greater public interest in having information available about the Solicitors' Guarantee Fund than in the ability of the Police Force to collect similar information in the future. The Tribunal therefore set aside the respondent's decision and directed the release of the advice of Hartog Berkeley, QC, dated 22 February 1978.

[K.R.]

REILLY and KILMORE AND DISTRICT HOSPITAL (No. 92/53034)

Decided: 26 August 1993 by Mrs Bretherton (Presiding Member).

Sections 33(1) and 35(1): employment-related documents.

The applicant sought access to four documents relating to her employment at the Kilmore and District Hospital ('the hospital') where she had been the Director of Nursing.

The hospital had decided to appraise itself of staff morale problems after the issue had been raised at a Board meeting. The Board then opened up a meeting for members of staff, other than the applicant, at which the Board was informed that the staff had held a no-confidence vote in respect of the applicant as director of nursing. This was submitted to the Board with an attachment. These were two of the four documents.

The Board then received a letter from Dr Janis Baker (Document 3) and the Board resolved to meet with the applicant to discuss the content of that letter and the no-confidence motion. As the applicant went on sick leave the meeting did not take place. The Board then received a letter from another person (Document 4). The applicant did not resume her duties and her position was eventually terminated.

In relation to the no-confidence document the Tribunal was not satisfied that the document was handed to the Board in confidence, and even if it had been, the Tribunal was not satisfied that it would be reasonably likely to impair the ability of the respondent to obtain similar information in the future. As such the document did not satisfy exemption under s.35(1) and was released to the applicant.

In contrast, the Tribunal held that the attachment to the no-confidence motion and the letter of Dr Baker had been provided in confidence and it was satisfied that there was a reasonable likelihood that it would impair the ability of the respondent to obtain similar information in the future 'to more than a trifling or minimal degree'. As such, the applicant was not entitled to access to that document.

The last document relied on s.33(1) and the Tribunal considered the balancing exercise involved with unreasonable disclosure of personal information. On reading the letter the Tribunal held that it would involve an unreasonable disclosure of information in that it dealt with personal matters of a type that if released would lead to that third person being identified and may well result in that person suffering stress and anxiety.

[K.R.]

NEW SOUTH WALES FoI DECISIONS

Court of Appeal

THE COMMISSIONER OF POLICE v THE DISTRICT COURT OF NSW AND PERRIN

(NSW Court of Appeal, Kirby P, Mahoney and Clarke JJA, 2 S pt mb r 1993)

There is no right of appeal to the Supreme Court of New South Wales on the merits or on questions of law from a decision of the District Court given under the *Freedom of Information Act* 1989. The court in this matter was asked to exercise the jurisdiction conferred by s.69 of the *Supreme Court Act* 1970 and grant relief which in former times had been effected by way of the prerogative writ of *certiorari.* Under s.69 the same type of relief is afforded by the court but by way of judgment or order made under the *Supreme Court Act.*

To obtain the order sought it required the Commissioner — the party seeking the relief — to establish that there was an error of law on the face of the record. Essentially, the Commissioner's case was that the District Court had misconstrued the *Fol Act* in an appeal before it and in doing so had committed an error of law which was apparent on the face of the record, namely, in the reasons for judgment published by the court (H.H. Bell J).

The proceedings involved the meaning of cl. in Schedule 1 to the *Fol Act* — the personal affairs exemption. The Commissioner had deleted the names and identifying particulars of certain police officers and public servants from documents

which had otherwise been disclosed in their entirety to the FoI applicant. The Commissioner's argument was that the names and particulars concerned the personal affairs of the people involved and that disclosure of the same would be unreasonable. It would be unreasonable because the balance of the public interest, in the Commissioner's view, was against disclosure due to the fact that the applicant had been given everything which the public interest required of the Police Service and therefore anything else would be an unwarranted intrusion into the privacy of the persons involved.

The documents related to the supply of certain materials to the Queensland Criminal Justice Commission by the Police Service and inquiries conducted by the Service into how that supply occurred. They were, therefore, documents which concerned official matters. There was nothing of a personal nature in the sense of materials relating to leave records, salaries, health or disciplinary matters and the like.

The Justices constituting the court held unanimously that the Court of Appeal had the jurisdiction to grant the relief in a proper case. Accordingly errors of law made by the District Court in FoI appeals which are apparent from the District Court record can be corrected in the Court of Appeal. Any such errors would nearly always be apparent, because they would appear in the published reasons.

However, the court came to the conclusion in the instant case that there was no error of law to be corrected. The court was of the opinion that where the names of police officers and public servants appeared in documents which contained nothing of a nature personal to them, but were documents concerned with the performance of their duties and responsibilities, in other words, normal routine agency documents, their names could not be said to concern their personal affairs. The affairs disclosed were rather the affairs of the agency.

Thus at p.30 of his reasons for judgment, Kirby P said:

> . . . the name of an officer or employee doing no more than the apparent duties of that person could not properly be classified as information concerning the 'personal affairs' of that person. The affairs disclosed are not that person's affairs but the affairs of the agency.

Kirby P was of the view that 'the words "personal affairs" mean the composite collection of activities personal to the individual concerned' (p.29).

Mahoney JA in his reasons, at p.23, said that the subject matter of the relevant documents was 'not part of the "personal affairs" of the persons in question: it is part only of their public duties and the discharge of them'. Clarke JA in his reasons, at p.6, doubted whether a person's name, as a matter of ordinary English, fell within the concept of 'personal affairs'. His Honour added that in particular circumstances it may be right to conclude that a person's name was a matter concerning that person's personal affairs and that the question was one of fact.

Where names of officers appear in personnel records, health reports and the like, it seems reasonably clear that the name would be regarded as information concerning personal affairs (see Kirby P at p.30).

The Court of Appeal in these proceedings rejected the approach adopted in Victoria by the Administrative Appeals Tribunal which clearly indicated that the name of an officer when used in connection with the performance of that officer's public duties concerned the officer's personal affairs.

The only other aspect of the case to which attention might specifically be drawn is the comment of Kirby P at p.33 of his Honour's reasons for judgment where he said:

> I tend to favour the view that the Act . . . must be approached by decision makers with a general attitude favourable to the provision of the access claimed . . . decision makers . . . should not allow their approaches to be influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of the Act and its equivalents.

[J.W.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

BOYLE and AUSTRALIAN BROADCASTING CORPORATION

(No. N92/322)

Decid d: 5 March 1993 by Deputy President B.J. McMahon.

Request for documents recording formal complaints of sexual harassment — claims for exemption under ss.40(1)(c) and 45 — one document inadvertently disclosed — whether document inadvertently disclosed can still be regarded as exempt.

The applicant had requested access to documents relating to a complaint of sexual harassment against him, together with all documents and memoranda subsequently generated or distributed in relation to the complaint. A number of documents were made available without amendment. Exemption was claimed in relation to four documents, one of which was inadvertently made available to the applicant.

The respondent claimed the four documents were exempt under s.40(1)(c) and s.45. In respect of the exemption claimed under s.40(1)(c), it claimed that disclosure of the documents would have a substantial averse effect on the management or assessment of the respondent's personnel on the basis that disclosure would undermine the effectiveness of its sexual harassment program. Exemption was claimed under s.45 on the basis that the relevant document was such as would found an action by a person for breach of confidence. The Tribunal concluded that three of the documents were exempt pursuant to para. 40(1)(c). The first document, in respect of which exemption was claimed pursuant to s.45, was ruled not exempt.

Section 45

The Tribunal first considered the claim for exemption under s.45 in respect of an inter-office memorandum from the respondent's Head, General Services, to various persons. The memorandum was addressed to a number of persons involved in the respondent's sexual harassment program, including the complainant, roving guards and Ms