FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

Commonwealth and Australian Capital Territory case summaries

Provision of FoI decision summaries for the Commonwealth and the Australian Capital Territory has been taken over by Neil Dwyer, a solicitor in the Canberra office of national law firm Corrs Chambers Westgarth. Neil is a former Commonwealth Government lawyer in both policy and practice areas.

He is a former FoI Co-ordinator in the Department of the Prime Minister and Cabinet, a position he occupied in the 1980s when FoI legislation was novel and the law was very much in its developmental phase. He was also the Privacy Officer in the Attorney-General's Department in the late 1980s and early 1990s, in which capacity he worked closely with the Privacy Commissioner.

Neil regularly presents FoI Practitioners' Forums for Commonwealth and Australian Capital Territory government agencies in Canberra. The summaries he provides for 'FoI Review' will be based on those produced for FoI Co-ordinators in the context of the Practitioners' Forums. Neil can be contacted for FoI or Privacy Act advice at Corrs Chambers Westgarth in Canberra on (02) 6257 7566.

SCHOLES and AUSTRALIAN FEDERAL POLICE (AFP) (Nos V93/1158; V93/1159; V94/533)

Decided: 4 October 1996 by J. Dwyer (Senior Member), McLean and Woodard (Members).

Access to documents relating to police investigation of the applicant; failure to consult in relation to personal information documents; meaning of 'unreasonable disclosure' in relation to personal information documents; documents released by another agency.

D cision

The AAT set aside the decisions under review and substituted its decision in relation to the documents as set out in a 21-page schedule attached to its reasons.

Facts and background

Scholes was a former AFP officer who, since leaving the AFP, became involved in businesses including an introduction agency. He was investigated by police in relation to his business affairs and allegations of corruption and fraud.

He submitted three separate FoI applications, each for different descriptions of documents, but all requests were for documents relating to various aspects of the police investigation and charging of him. These included prosecution witness statements, police notebooks, records of interview, evidence furnished to an internal inquiry and reports of inquiries by both the Commonwealth and Victorian Ombudsmen.

The three FoI requests covered a vast number of documents. Forty 'folios' were identified in relation to V93/1158 and 2128 folios in relation to V94/533.

At the AAT hearing some documents had been released in their entirety, and the AAT was required to consider a range of exemptions, some for entire documents and some for deletions.

Findings on exemption claims

Section 37(1)(b)

The AAT upheld the confidential source exemption for one statement only and for references to that statement in other documents.

The AAT found a significant number of documents for which exemption had been claimed were not exempt because their contents did not emanate from confidential sources of information.

The AAT said confidentiality is central to this exemption claim. There are no degrees of confidentiality — a source of information is either confidential or it is not.

The requisite confidentiality existed where the source of information was a police informer. But where the material was obtained by a potential police witness, there was no confidentiality.

The AAT accepted that the meaning of the words 'would, or could reasonably be expected to' means the same in s.37(1)(b) as it does for the corresponding part of s.43(1)(c)(ii).

The AAT also noted that there is no public interest test in s.37(1)(b).

Section 37(1)(c)

The AAT rejected all claims for exemption based on endangering life and physical safety.

The question of whether disclosure might endanger the life or physical safety of a person is to be objectively judged in the light of all relevant evidence. While there was some evidence that Scholes was short tempered during a period of stress, there was no evidence that he made threats to endanger the life or safety of any person.

Section 37(2)(b)

The AAT rejected all claims for exemption based on protection of methods or procedures for investigating breaches of the law.

The AAT referred to the *Mickleburg* ((1986) 6 *FoI Review* 79) and *Anderson* ((1986) 3 *FoI Review* 42) cases and the distinction between specific reference to methods of investigation and the provision of information from which those methods may be inferred.

In particular, the AAT regarded it as 'ludicrous' to suggest that disclosing that police make contact with witnesses and interview people is

disclosing methods or procedures which would or would be reasonably likely to prejudice the effectiveness of those methods or procedures.

The AAT was satisfied that if police methods and procedures are already in the public domain the release of documents referring to those methods and procedures would not be contrary to the s.37(2)(b) exemption.

Sections 40(1)(d) and 40(2)

The AAT rejected all claims for exemption based on preventing substantial adverse effect on the conduct of the AFP's operations.

The AAT referred to the interpretation of 'substantial adverse effect' in *Harris and the ABC* as going beyond possible embarrassment to the agency and requiring that a degree of gravity must exist.

The AAT was satisfied that references to police methodologies in the documents would not reveal anything of which the community is not already aware.

There was one document in particular, the contents of which may have raised questions of why particular information was not acted upon. The AAT felt, however, that disclosure of this would be beneficial to the proper and efficient conduct of the AFP by leading to improvements in its operations.

In relation to this document the AAT further noted that even if it were to have an adverse effect on the AFP, it would be in the public interest to disclose it.

Section 41(1)

The AAT was critical of the AFP's failure to consult under s.27A. The AAT suggested early in the hearing that some people whose personal information was the subject of a s.41(1) exemption claim may not object to the release of that information.

Consequently, the number of documents for which s.41(1) exemptions were claimed was significantly reduced during the hearing.

The AAT expressly stated that it considered s.27A contemplates that decisions will be made after having regard to submissions made in response to a s.27A consultation.

The AAT was also critical of the content of the consultation letters in that they did not make it clear that the people contacted could make submissions on possible release.

In dealing with the exemption claim, the AAT reviewed the case law at some length and came to the following conclusions:

(1) The onus is on the agency to advance material establishing the unreasonableness of disclosure.
(2) The mere fact that a document contains personal information is not sufficient to establish unreasonableness of its disclosure; and
(3) In deciding whether proposed disclosure would be unreasonable the Tribunal must balance competing public interests in:
   (i) ensuring personal information is not necessarily disclosed; and
   (ii) enabling access to information relevant to the affairs of government.

Against this background, the AAT considered the requests by people not wanting their personal information disclosed by taking into account the four factors set out in s.27A(1A).

The AAT noted, in deciding on the unreasonableness of releasing personal information, that Scholes believed there was a conspiracy against him and that there was at least material capable of supporting an inference that the AFP had been manipulated against Scholes.

Examples (non-exhaustive) of information in respect of which the exemption was upheld because disclosure would have been unreasonable are:

- personal information about a person who supplied information after Scholes was charged;
- personal information about a person who gave information that was not acted on;
- information such as the address and drivers licence number of people known to Scholes because he received their witness statements where the information in question was not included in the witness statements;
- the identity of a person inadvertently named in a document and who had no involvement with Scholes or the investigation; and
- personal information about police officers where that information had nothing to do with their official functions.

Examples (non-exhaustive) of information in respect of which the exemption was not upheld because disclosure would not have been unreasonable are:

- information relevant to an appraisal of the police investigation of Scholes;
- the identities of persons known to, or involved in, relationships (including a personal relationship) with Scholes;
- personal information about people whose only objection to release related to fear for their safety (the AAT rejected all s.37(1)(c) claims);
- information which Scholes already had as a result of receiving copies of police statements from the DPP; and
- identities and aliases of persons named in open hearings.

Section 42(1)

The AAT rejected the legal professional privilege exemption on the one document in respect of which it was claimed. The document had already been released to Scholes but with two names deleted.

Legal professional privilege protects legal advice only.

Documents released by another agency

A further issue was considered by the AAT in relation to documents which the DPP had released to Scholes in response to an FoI request. The AFP claimed exemptions under ss.37(1)(b), 37(1)(c), 40(1)(d) and 41(1).

The AAT held that, as the documents had already been released, there would be no 'disclosure' in releasing them to Scholes. Disclosure had already occurred. Therefore, disclosure by the present respondent would be incapable of having the effect referred to in those exemption provisions. Therefore the documents in question were not exempt documents.

Comment

The AAT noted that there were some instances of the AFP's claiming exemption in respect of documents under one request but which were not claimed to be exempt under another request. Once the documents had been released pursuant to a decision the exemption claim could not be sustained in relation to the other decision.

This should not be confused with those situations where documents

were released in error to Scholes. The AAT stated that inadvertent release of documents does not destroy any claim for exemption an agency may wish to make.

This case was obviously a difficult one for both the AFP and the AAT because of number of documents and the areas of overlap in the three FoI requests.

JENNINGS and AUSTRALIAN FEDERAL POLICE (No. Q96/631)

D cid d: 6 November 1996 by S. Forgie (Member).

No jurisdiction in AAT to review accuracy of contents of documents which do not contain personal information.

Decision

The AAT found it had no jurisdiction to review the accuracy of the contents of documents and affirmed the decision under review.

Facts and background

Jennings has a divorced daughter and had formed the view that his former son-in-law had committed perjury during the Family Court proceedings in relation to his daughter's divorce.

Jennings pursued matters variously with the Queensland Criminal Justice Commission and with the Commonwealth Attorney-General's Department. His allegations were subsequently referred to the Australian Federal Police (AFP) and the Director of Public Prosecutions. In pursuit of his complaint, he issued summonses against two AFP officers alleging certain material had been omitted from the brief of evidence to the DPP and that additional material had been fabricated.

Jennings subsequently submitted an FoI request to the AFP for documents presumably relating to his complaints or allegations against AFP officers although this is not explicit in the AAT's reasons for decision.

Jennings was given access to a number of documents. He sought and obtained internal review and subsequently applied to the AAT for review.

Jennings did not seek review of exemptions, as such. Instead, he sought a review of the substance of three of the documents he had received in response to his FoI request.

Prior to the preliminary conference in the matter, the AFP sought to have the application dismissed as frivolous or vexatious pursuant to s.42B of the *AAT Act*.

At the preliminary conference both Jennings and the AFP agreed that the conference be reconstituted as a hearing. The hearing then immediately proceeded.

AAT review

Jennings sought review of the accuracy of statements made in documents he had received.

The documents in question contained summaries of Jennings' pursuit of his allegations about handling of his complaint and included an account of telephone calls made to a Queensland Senator's office.

The AAT held that this was not personal information within the meaning of s.4(1) of the *FoI Act*. It was therefore not possible to make any amendments pursuant to s.48 of the *FoI Act*.

The AAT decided that it does not have the jurisdiction under the *FoI Act* to review the accuracy of information contained in documents.

Comment

This is an unusual, but not uninteresting, FoI issue.

There is not a great deal of detail about the background contained in the AAT's reasons for decision. It may be that Jennings misunderstood the correction of personal records provision. It is worth noting in this context that Jennings was not represented but appeared in person and may not have had the advantage of appropriate legal advice.

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

Decided: 6 February 1997 by Deputy President McMahon.

Documents relating to complaints and internal administration of respondent agency.

Decision

All of the exemption claims under ss.36(1), 40(1)(d) and 41(1) were rejected. The AAT set aside the decision under review and remitted the matter back to the Refugee Review Tribunal (RRT) with a direction that access be given to the relevant documents. A confidentiality order under s.35 of the *AAT Act* was accordingly withdrawn.

Facts and background

Subramanian sought access to 'all documents/file notes/memoranda, and all other notes and documents etc, supplied by RRT Member Hayward supporting claims regarding malpractice within the RRT both with respect to Federal Court and other internal procedures/matters as supplied to Acting Principal [Member], Mr Gerkens'.

Subramanian had, through a previous (and totally unrelated) FoI request obtained access to a memorandum from Refugee Review Tribunal (RRT) member Hayward to RRT Principal Member Certoma. That memorandum contained statements concerning alleged activities of officers of the RRT in relation to RRT matters generally and including a matter in which the present applicant was concerned.

Subramanian's solicitor wrote to the then acting Principal Member Gerkens demanding an explanation. Mr Gerkens accordingly wrote to Ms Hayward seeking explanations. Ms Hayward responded with a 51- page electronic mail document. She followed this up with a hard copy version of the document (60 pages) which also contained numerous attachments.

These two documents were the subject of the present FoI application.

The attachments to the second document were bulky — there were about 20 documents or groups of documents. Fifteen of these attachments were documents from Ms Hayward to Professor Certoma in the latter's capacity as RRT Principal Member. They included complaints about actions of RRT officers and complaints about administration and procedures generally.

The initial FoI decision was made by a Deputy Registrar of the RRT. The internal review was conducted by a Registrar. Although it was this Registrar's decision which was under review by the AAT, she was ill at the time of the hearing and could not give evidence. Consequently, the AAT had to rely on an affidavit by acting Registrar McIlwain who had not been involved at all in the decision-making processes.

The internal review decision claimed total exemption for both documents under s.40(1)(d); 41(1) and 45(1). Before the AAT hearing, the s.45(1) claim was withdrawn and replaced by a s.36(1) exemption claim. The AAT rejected all these claims.

Findings on exemption claims

Section 36(1)

The documents in question did not form part of the deliberative processes of the RRT. It would be 'stretching the language' to call them deliberative documents.

Even if they were deliberative documents, it was not contrary to the public interest to release them.

Embarrassment of the RRT by public disclosure of the documents revealing internal difficulties did not constitute a ground of public interest.

Three of the memorandums had already been released to Subramanian's solicitor and no public interest damage had resulted from that.

Section 40(1)(d)

There was no 'substantial adverse effect' on the operations of the RRT if the documents were released. The AAT noted that no officers of the RRT had been disciplined, cautioned or investigated as a result of Ms Hayward's allegations — the workings of the RRT had not been affected (let alone 'substantially' affected) in any way.

The AAT again noted the significance of three memorandums having already been released with no consequent effect on the operations of the RRT.

Section 41(1)

The AAT rejected the RRT's submission that the 1991 legislative amendments to the definition of 'personal information' and to s.41(1) were intended to bring comments concerning work performance within the scope of the s.41 exemption. To qualify for exemption there must be disclosure of information concerning a person as an individual.

Comment

The AAT noted the 'paucity of the evidence' brought by the RRT as a 'feature of the presentation' before the AAT. Mr McIlwain's knowledge was based on his reading of the documents and conversations with others. No evidence was led as to how the documents came into existence or dealing with the facts and allegations contained in the documents.

Two key players, Professor Certoma and Ms Hayward, were not called to give evidence but there was apparently no suggestion that they were unavailable.

Whatever the merits of the exemption claims might have been, the RRT probably did its case no good by not leading evidence and relying on the affidavit.

Federal Court

HAYES v SECRETARY, DEPARTMENT OF SOCIAL SECURITY (DSS)
(No. SG79 of 1996; 43 ALD 783)

D cid d: 6 December 1996 by Mansfield J.

Confidential source of information; absence of balancing public interest provision; whether an anonymous, unsigned 'dob in' letter is necessarily confidential.

Decision

The Federal Court upheld an AAT decision that an anonymous handwritten letter to an agency was an exempt document because its disclosure would disclose a confidential source of information.

Facts and background

Hayes had sought access under the *Fol Act* to a handwritten unsigned letter to the DSS which contained adverse information concerning his entitlement to a disability support pension.

The AAT affirmed the DSS's decision that the document was exempt under s.37(1)(b) for the reason that it would, or could reasonably be expected to, enable a person to ascertain the existence or identity of a confidential source of information.

Hayes relied on a dissenting judgment in *Sinclair and the Secretary to the Department of Social Security* (1985 9ALN N127). That dissenting judgment concluded that a letter written in similar circumstances was not exempt under s.37(1)(b).

Hayes also argued that the AAT had erred in law by not taking into consideration the impact of the DSS's delay in putting the contents of the letter to him.

Decision

The Court held that the question of whether a source of information is confidential is a question of fact to be decided in all the circumstances of a particular case. The dissenting judgment in *Sinclair* did not turn on the fact that the letter in that case was unsigned. The dissenting judgment looked at all the circumstances and concluded that the source was not confidential.

On Hayes' submission that the AAT had failed to consider the impact of the agency not putting the contents of the letter to him, the Federal Court held that this was irrelevant. There is no balancing public interest element in s.37. Once a decision maker is satisfied that the source of information is confidential and there is a possibility that disclosure could reveal that source, that is enough to engage the s.37(1)(b) exemption.

Comment

In essence, Hayes, by relying on the dissenting judgment in the *Sinclair* case, was inviting the Federal Court to find as a matter of law that an unsigned anonymous letter could not be a confidential source of information. The Court declined to do so.

Note also that, in examining all the circumstances of the case, confidentiality of supply may be either express or implied.

[N.D.]