

undertakings with whom they do business. Nevertheless, the Tribunal found that — in the context of the policy evident in the *Freedom of Information (Miscellaneous Amendments) Act 1999* — that disadvantage was not to be regarded as unreasonable. In any event, the Tribunal considered that any such disadvantage to the Council in the present case may have been more theoretical than real. This was because it seemed unlikely that LMM and MRW could, from a business perspective, simply refuse to deal with bodies subject to the Act.

Accordingly, the Tribunal found that LMM's documents were not

exempt under s.34(4). (The Tribunal did not consider it necessary to determine whether MRW's documents were exempt under that section because those documents were already found to be exempt under s.34(1)(b)).

Section 50(4)

Byrne argued that the public interest required the disclosure of the MRW-related documents. He argued that there was a public interest in 'clearing the air' of public disquiet relating to the tender process, particularly since MRW gave the report to the Council that led to the tender process being conducted.

The Tribunal characterised the public disquiet that had been demonstrated by the evidence as concern that Byrne had been unjustly treated and that the management of an important public facility had been handed over to 'out of towners'. It observed that it was 'not obvious' how releasing the documents lodged by an unsuccessful tenderer could in any way assuage that public disquiet.

The Tribunal went on to conclude that there was no 'convincing public interest' made out that required the release of the MRW-related documents.

[J.D.P.]

FEDERAL FOI DECISIONS

Administrative Appeals Tribunal

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[N.D.]

COSCO HOLDINGS PTY LIMITED and DEPARTMENT OF TREASURY (No. A96/456)

Decided: 27 February 1998 by Deputy President Forgie.

FOI Act: Sections 3, 16, 33A(1)(a), 33A(1)(b), 33A(5), 34, 42.

AAT Act: Sections 37, 42C.

Commonwealth/State relations: effect of disclosure of communications between State Officials and Commonwealth officers; distinction between having an effect and actually damaging relations between governments; public interest in

Commonwealth/State relations exemption.

Decision

The AAT set aside the decision of the Department of Treasury (the Treasury) and held that five documents were not exempt. It also set aside a decision in relation to a sixth document and held that only part of the Treasury's exemption claim could be upheld.

Facts and background

Cosco Holdings Pty Ltd (Cosco) was a company that produced paper products. It was one of three companies identified by the Commonwealth government as being particularly adversely affected by the removal, in June 1992, of a sales tax exemption for products made from 100% recycled paper. The Treasury was responsible for the administration of the Transitional Assistance Payments Scheme (TAPS) under which financial assistance was given to Cosco along with the two other affected companies.

Under TAPS, Cosco lodged applications for assistance. Because Cosco was based in Queensland, the Queensland Department of Tourism Small Business Industry (DTSBI) had a role in auditing Cosco's use of 100% recycled paper. DTSBI provided information to the Treasury to enable Cosco's

claim for assistance to be assessed under TAPS.

Cosco submitted a claim in respect of the 1992/93 financial year. The Treasury had been informed that Cosco had used 212 tonnes of virgin pulp (ie not 100% recycled paper) during part of that year. Cosco was unable to provide its own contrary evidence to Treasury because a fire had destroyed its records. As a consequence the Treasurer ruled that all paper used for the relevant parts of that year were to be assumed to have included some virgin pulp. The effect of this was that Treasury disallowed the applicant's claim to the extent of about \$500,000.

Cosco sought access to a wide range of documents which would include material showing how its application under TAPS had been handled and the decision made.

Findings on exemption claims

Although over 400 documents were the subject of exemption claims after the internal review stage, by the time the AAT made its decision, exemption claims had been dropped by negotiation on all but six documents. Of the six documents on which the AAT made its decision in this case, five were claimed to contain material exempt under s.33A(1)(a) or s.33A(1)(b); (Commonwealth State Relations). One document was claimed to contain an exempt paragraph under s.42 (Legal Professional Privilege).

Section 33A(1)(a)

The AAT rejected all exemption claims made under s.33A(1)(a). It decided that, while there may be some adverse effect on communications between State and Commonwealth officers, caused by release, this would not be so extensive as to damage the relations between the governments of the State of Queensland and the Commonwealth.

The Treasury relied on affidavit evidence from both an officer of DTSBI in Queensland and an assistant secretary of the Treasury. The DTSBI official deposed that the officials who had conversed with the Treasury in assessing the Cosco's TAPS entitlement had understood that the communications were of a confidential nature. The AAT accepted that release of the information might cause DTSBI officers in future to be unlikely to release relevant information. But the AAT did not consider this would go so far as to constitute damage to relations between two governments. On this basis the AAT found the exemption claim under s.33A(1)(a) was not made out.

Section 33A(1)(b)

The AAT accepted that the basis of a s.33A(1)(b) exemption had been made out because it would divulge information or matter communicated 'in confidence' by a State government to the Commonwealth government. But as to whether the relevant parts of the documents could be released, the AAT then turned its attention to the public interest question under s.33A(5).

Section 33A(5)

The AAT found that the public interest requirement of s.33A(5) had not been made out.

The AAT considered the question of the balance of the public interest. The AAT was unable to find that officers of DTSBI 'will not, or even are unlikely to, forward their opinions' to the Commonwealth. The only basis on which the public interest component could be assessed came down to one of candour and frankness and the likelihood of its being compromised.

The AAT then referred to the *Murtagh* decision which suggested that there was no evidence that the enactment of the *Fol Act* had led to inappropriate lack of candour between officers. The AAT found in

the present case that, while the opinions expressed by the DTSBI officers were important in the assessment of the TAPS application, there was no risk of any diminution of the candour and frankness shown in the past by DTSBI's officers.

The AAT noted that the information gathered in this particular case was gathered specifically on behalf of the Commonwealth. It was therefore difficult to see how its release by the State of Queensland could affect the flow of information to the Commonwealth generally. The AAT distinguished the facts in this case from those in the *Northern Territory Environment Centre* case because in that case the Northern Territory's departments and agencies were acting in their own interests as much as they were acting on behalf of the Commonwealth.

Section 34(1)(d)

The AAT upheld an exemption claim under s.34(1)(d) in relation to a passage from the sixth document. The AAT was satisfied that to disclose the passage would involve disclosure of a deliberation of Cabinet by other than official means.

Section 42

The sixth document also contained three passages in respect of which claims had been made on the basis of legal professional privilege. The material in question included legal advice and comment on substantive legal advice. The AAT took the view that the reference to legal professional privilege in s.42 is a reference to the common law concept rather than to the concept of 'client legal privilege' as contained in the Commonwealth *Evidence Act 1995*.

The AAT upheld the legal professional privilege exemption in respect of some, but not all, of the passages for which the claim was made. Statements of fact to give the Treasurer background information rather than to respond to his seeking legal advice were not protected by s.42.

Where the material in question constituted advice in the character of solicitor/client communication, the s.42 claim was upheld.

The AAT noted that the communication was made by the legal adviser to a Treasury official for the purpose of providing legal advice to the Treasurer. The interposition of the Treasury official did not constitute the

existence of a third party for the purpose of defeating the legal professional privilege claim. This was because either it was given to the Treasury official so that it could be passed on to the Treasurer who was the intended recipient of the legal advice or because in the present circumstances the Treasury and its officers were, in effect, the same party as the Treasurer himself.

Comment

It is suggested that the decision of the AAT in relation to the Commonwealth/State relations exemption claim is a sensible and practical one. It is important in this context to note that all Queensland officials were doing was passing information to the Commonwealth so that the Commonwealth could administer the TAPS program. The position would have been different if the information in question had been of particular value or interest to the Queensland government.

[N.D.]

STREETER and SECRETARY TO THE DEPARTMENT OF EMPLOYMENT, EDUCATION, TRAINING AND YOUTH AFFAIRS (DEETYA)
(No. Q97/590)

Decided: 20 March 1998 by Senior Member K.L. Beddoe.

Fol Act: Sections 22, 36(1), 37(1)(b), 37(2)(b), 40(1)(d), 41(1).

AAT Act: Section 35.

Access by AUSTUDY recipient to confidential source of information; agency's written record of anonymous telephone information; status of documents passed to agency by another agency; unreasonable disclosure of personal information.

Decision

The AAT set aside the decision of the respondent agency DEETYA that three particular documents were exempt and substituted its own decision that those documents be released to Streeter subject to the deletion of personal information.

Facts and background

Streeter was an AUSTUDY recipient. DEETYA was endeavouring to recover from Streeter AUSTUDY overpayments. Streeter sought access to documents relating to his

AUSTUDY application and assessments to enable him to prepare his case against DEETYA.

Documents comprising 90 folios were identified as relevant. Of these, 82 were released in full and a further five with the deletion of certain tax file numbers.

The three documents at issue had come into existence as a result of anonymous telephone calls made to officers in another agency. That agency passed its notes of the anonymous calls on to DEETYA because of its AUSTUDY function.

DEETYA relied on several grounds of exemption in affidavit material produced to the AAT. At the hearing, however, only ss.37(1)(b) and 41(1) were actually argued and the reasons for decision deal only with those two provisions.

Findings on exemption claims

Section 37(1)(b)

The AAT found the confidential source of information exemption claim had not been made out.

The AAT noted that there were three elements in this exemption namely:

1. whether documents are in fact a confidential source of information;
2. whether documents relate to law enforcement or administration; and
3. whether release would disclose the confidential source.

The AAT rejected DEETYA's claim on the basis of the first ground, namely that the source of information was not confidential. There was nothing to indicate on the documents that the information had been given confidentially.

The fact that the telephone caller was anonymous was not sufficient to establish that the source was confidential.

On the question of the respondent's policy of treating such information as confidential, the AAT stated that while this may be a factor to be taken into account, it is not determinative of whether the source is in fact confidential.

The AAT noted that the information had been passed to DEETYA by another agency which apparently did not regard the information as confidential.

Having decided that the s.37(1)(b) exemption did not apply because the first element had not

been satisfied, the AAT then only briefly considered the second and third elements identified above.

The AAT was satisfied that the information related to law enforcement or administration.

The AAT did not consider that release of the documents could point only to the identity of one person or a limited number of persons. The documents were not in the handwriting of the informer although it was possible that somebody familiar with certain domestic arrangements referred to might be able to infer from that information the identity of the source. However, the AAT found, in relation to this third element, that release would not necessarily disclose the source of the information.

Section 41(1)

The AAT decided that certain passages of the two documents should be deleted on the grounds of unreasonable disclosure of personal information.

In this case, names of persons and identifying file numbers were able to be ascertained from the information contained in the two documents.

The AAT noted the observation made in the *Chandra* case in 1984 that disclosure is unreasonable if it is likely that the person concerned would not wish to have that information disclosed without consent and whether the information has any current relevance. The AAT also noted the expansion on that statement in the *Williams* case, namely that in assessing reasonableness it must be considered as if disclosure is to the world at large.

The AAT also noted the three elements identified in the *Scholes* case, namely:

1. the agency bears the onus of establishing that disclosure would be unreasonable;
2. the mere fact that a document contains personal information does not necessarily mean that disclosure would be unreasonable; and
3. in deciding whether or not disclosure is unreasonable, the AAT must balance competing public interests.

In the facts of this case, the AAT found that those criteria were satisfied and that disclosure of the information indicated would be unreasonable.

Natural justice

The AAT had made a restriction order under s.35 of the *Administrative Appeals Tribunal Act 1975* to protect the documents the subject of review from release in case parts of them were held to be exempt. It appears from the reasons for the decision that Streeter sought to argue that he had been denied natural justice in relation to this order.

The AAT affirmed that it is obliged to comply with the requirements of natural justice as set out in the *Pochi* decision in 1980. The AAT explained, however, that the s.35 order was made to protect the documents against release in case they were held to be exempt.

The AAT noted that only DEETYA can release the documents which, as a result of the AAT's decision, it was now obliged to do subject to the deletion of the s.41(1) exempt material.

Comment

An interesting aspect of this case is that the AAT reconvened after the first hearing date as a result of a letter written by Streeter to the AAT claiming, that as he was unrepresented at the first hearing day and was required to respond on the spot to technical exemption claims, he should be given the opportunity of further addressing those claims. He requested the further hearing which was agreed to and conducted by telephone.

[N.D.]

TESEO and SECRETARY, DEPARTMENT OF SOCIAL SECURITY (DSS) (No. W98/101)

Decided: 5 June 1998 by Senior Member Professor Hotop.

Fol Act: Sections 11(1); 15(6); 54(1)(b); 54(1)(ba); 55(1)(ab).

Decision purporting to grant access to all documents relating to an Fol request but not actually granting that access.

Decision

The AAT set aside the decision under review and substituted a decision granting access to all documents relevant to the request

Facts and background

The applicant, Teseo, submitted an FoI request for access to a range of documents concerning joint schemes or arrangements between the DSS and the State Housing Commission of Western Australia (Homeswest). Teseo expanded on his request by spelling out details of the sorts of documents to which he was seeking access. Teseo specifically sought access to statements setting out particulars of arrangements between the DSS and the State Housing Commission and also included a reference to any agreement or joint scheme.

In response, the DSS referred to the formation of the Commonwealth Services Delivery Agency (which trades as Centrelink) and included a copy of an agreement which was then currently in force. The original decision maker went on to observe that '[t]he document appears to answer the query stated in [the Applicant's] letter'. The decision maker also included in his decision the words 'I have decided to grant you full access to this document. A copy is attached ...'

Teseo sought internal review of the decision. It appears from the AAT's reasons for the decision that Teseo suspected there would be further documents relevant to the scope of his request.

Following receipt of the internal review request and telephone contact with Teseo, the DSS provided Teseo with a copy of 'the old agreement'.

AAT consideration

At the hearing, it became apparent that there were further documents in existence which were relevant to Teseo's request. Documents were tendered in evidence in which officers of the DSS acknowledged that there would be further relevant documents. Counsel for the DSS indicated that the respondent would be prepared to release those documents. In oral evidence, one of the DSS's officers indicated that some of them might be subject to deletion of exempt material but that it was possible these exemptions might not be claimed by the DSS. He was, however, not able to confirm this.

In summary, it became apparent at the AAT hearing that there were further documents and that the DSS would be prepared to release most

or all of them, subject to some possible exemptions.

The AAT concluded that the decision under review was a decision purporting to grant access to all documents but not actually granting access. Section 55(1)(ab) provides that application may be made to the AAT for review of such a decision. In the present case, such a review was made and the AAT set aside the decision under review and substituted its decision that Teseo had, under s.11(1) of the *FoI Act*, a right of access to all identified relevant documents. The AAT, however, expressly refused access to identified portions of some of the documents being portions which, presumably (although it is not explicitly stated in the AAT's reasons), the DSS might want to argue were exempt under the *FoI Act*.

Comment

It appears from the facts as set out in the AAT's reasons for its decision that the DSS may have assumed that Teseo was interested only in a particular document. It is clear that an FoI decision maker must consider all documents that are relevant to the scope of the applicant's request. Section 55(1)(ab) reinforces this by confirming that that particular avenue of application for review is available.

[N.D.]

'WAJ' and COMMONWEALTH OMBUDSMAN and BROWN (No. W96/391)

Decided: 22 June 1998 by Senior Member Professor Hotop.

FoI Act: Sections 3, 4(1); 11(1); 22; 41; 58(2).

FoI request to the Ombudsman by the subject of a complaint to the Ombudsman; status of documents provided by the complainant; oral assurances given by a senior official of the Ombudsman's Office.

Decision

The AAT set aside the decision under review and granted access, with certain deletions, to some documents.

Facts and background

The applicant 'WAJ' was an officer of the Australian Taxation Office (ATO). He was the subject of a complaint made to the Commonwealth

Ombudsman by Mrs Brown, a party joined. Mrs Brown was the niece of a Mrs Humphreys who died in March 1993. Mrs Brown alleged that WAJ had advised Mrs Humphreys on her tax returns while WAJ was an officer of the ATO.

Mrs Brown wrote a letter of complaint to the Perth office of the Commonwealth Ombudsman. In response, an appointment was arranged with a senior officer of the Ombudsman's office. At that meeting Mrs Brown made documents available to the Ombudsman solely on the basis that they would remain confidential. These documents were relevant to two FoI requests made (see below) by WAJ and were subsequently identified by the AAT as documents C, J and K.

WAJ made two FoI requests to the respondent Commonwealth Ombudsman.

The first request, dated 29 May 1995, was for all documents held in relation to a complaint made by Mrs Brown in relation to WAJ's capacity as an ATO Officer. It led to the identification of 184 folios as falling within the scope of the request. Of these, 177 were released (eight of these under a deferred access decision) and the remaining seven were released either with deletions (three) or held totally exempt (four folios).

The second FoI request was dated 26 June 1996. It was a request for documents 'subsequent to those provided under the previous application'. This request also included a further request for access to the four folios refused as totally exempt under the first request. In response to this second application a total of 328 folios were identified as relevant. Of these, access in full was granted to 303, access with deletions to a further four and the remaining 21 were the subject of total exemption claims.

Following internal review of the second decision, which included continued denial of access to the four folios for which total exemption had been claimed in response to the first request, WAJ applied to the AAT for review. There followed a preliminary conference and discussions between WAJ and the Commonwealth Ombudsman as a result of which further documents were released so that the only documents at issue before the AAT in this decision were three documents identified as documents C, J and K.

Mrs Brown, who was joined as a party, was consulted in relation to claims she may wish to make that documents C, J and K should not be released to WAJ. Mrs Brown subsequently wrote to the AAT indicating that she wished to continue her objection to the documents' release.

Findings on exemption claims

The only Part IV exemption claimed by Mrs Brown was that contained in s.41 — the unreasonable disclosure of personal information exemption.

The Commonwealth Ombudsman was not represented at the AAT hearing. Neither WAJ nor the Commonwealth Ombudsman objected to Mrs Brown's being joined as a party.

The AAT rejected a submission made by WAJ that there was a distinction between 'personal affairs' for the purposes of s.41 and business or professional affairs. The AAT noted the 1991 amendment to the *FoI Act* to bring the definition of 'personal information' into line with the corresponding definition in the *Privacy Act 1988* and said any distinction between personal affairs and business affairs is irrelevant. If information is 'personal information' other possible characterisations of it are not relevant for the purposes of the s.41 exemption.

The AAT found that each of the documents C, J and K, contained 'personal information'.

Document C was a two-page *aide memoir* which Mrs Brown had prepared for her own use when she had gone to discuss her written complaint with the senior officer in the Ombudsman's office. Mrs Brown's evidence was to the effect that she had given the document to the senior officer of the Commonwealth Ombudsman only after he had assured her that its confidentiality would be protected. Mrs Brown relied on a statement she alleged the officer had made to her concerning a confidentiality assurance by saying 'you can rest assured on that'. Mrs Brown also relied on the content of various information and publicity leaflets produced by the Ombudsman's office stating that complaints to the Ombudsman are made in circumstances of confidentiality. Mrs Brown stated that she was not aware that the document might be made available in response to a request under the *FoI Act*.

The AAT accepted Mrs Brown's evidence.

Document J was a letter of three pages from Mrs Brown to an officer of the Commonwealth Ombudsman's Sydney office which also contained some personal information.

Document K was a supplementary letter of three pages from Mrs Brown to the same Sydney officer of the Ombudsman's office, again containing largely personal information.

In considering whether to exempt material from release to the applicant under s.41, the AAT made the following observations in considering whether to uphold the s.41 claim.

The AAT referred to the observation in *Colakovski v Australian Telecommunications* (1991) 33 *FoI Review* 32 that 'unreasonable' disclosure for the purposes of s.41 has, as its core, public interest considerations. The exemption is not so much to protect private rights as it is to further the public interest in information of a certain kind being excepted from the general right of public interest. There is some information the making public of which serves no public interest purpose. As was said in *Colakovski*, if information is of no demonstrable relevance to the affairs of government and is likely to do no more than excite or satisfy curiosity, disclosure is probably unreasonable.

Document C contained statements, opinions and assertions by Mrs Brown about various individuals including herself and WAJ. The AAT formed the view that the persons concerned would be likely to object to its disclosure without their consent. There was no evidence before the AAT that these parties had so consented — in Mrs Brown's case, she was obviously objecting to release. The AAT held that the public interest in preserving the personal privacy of those individuals outweighed any public interest in disclosure of them.

The AAT found that, in relation to document C, information concerning WAJ was 'inextricably interwoven' with personal information about other people. It was not possible therefore to disclose information about WAJ to WAJ without also disclosing personal information about other persons.

Document C was held to be wholly exempt. Documents J and K contained some exempt material but the AAT held that parts of those documents could be released to WAJ.

Material which had already been provided to WAJ in other documents, and which was duplicated in documents J and K, was obviously able to be released. There was, however, some material contained in the documents which was personal, provided by Mrs Brown in the expectation that it would remain confidential, and of no relevance to the affairs of government. The disclosure of such information would obviously be unreasonable.

Document K contained some personal information about various persons other than WAJ. Much of the document was therefore exempt. But not all of the material was exempt and parts were, accordingly, released to WAJ.

Subsection 41(2)

The AAT considered the meaning of subsection (2) of s.41 in the context of a submission by WAJ that because he was the legal representative of the late Mrs Humphreys, he was, effectively, the same person as Mrs Humphreys for the purpose of s.41(2). The AAT noted that WAJ had made this *FoI* request in his own personal capacity and not in his capacity as the legal representative of Mrs Humphreys. The AAT rejected this submission.

Comment

This case illustrates a relatively straightforward application of the *Colakovski* principles as they apply to the concept of 'unreasonable disclosure' for the purposes of the s.41 exemption.

[N.D.]

McGARVIN and AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY (No. V96/452)

Decided: 30 July 1998 by Deputy President McDonald.

FoI Act: Sections 33A(1)(a); 33A(1)(b); 36(1); 42(1); 43(1)(c)(ii); 45; 56(1).

Deemed refusal; access by retired state school teacher to documents concerning decision to reduce benefits under Victorian Public Sector Superannuation Fund; large number of documents; deliberative documents.

Decision

The AAT considered 75 documents and held 52 exempt; 12 to be

released and 11 to be released with deletions.

Facts and background

McGarvin was a retired Victorian state school teacher. The respondent agency, the Australian Prudential Regulation Authority (the Authority), which was until 1 July 1998 known as the Insurance and Superannuation Commission (ISC), is responsible for supervision and provision of advice to the government in relation to the Australian superannuation and insurance industry.

In 1993, the Victorian State Parliament passed legislation the effect of which included changes to certain superannuation benefits for retired State public servants and teachers. The State legislation was in breach of Commonwealth legislation administered by the Authority and the Victorian government consequently sought approval for its legislation from the Authority.

McGarvin lodged an FoI request in March 1996 to the ISC for access to documents relevant to decisions of the ISC to reduce benefits to members of the Victorian Public Sector Superannuation Fund. The Authority did not make a decision within 30 days. Accordingly, McGarvin applied on 18 April 1996 to the AAT on the basis of a deemed refusal (s.56(1)).

In view of the respondent agency's responsibility for supervision of the industry and the application to approve the State legislation, there were consultations between the Authority and relevant State authorities and with other bodies such as the Victorian Trades Council.

In the material put before the AAT in the course of the review process, the Authority indicated that there had been a total of 503 documents identified as relevant to the scope of the request. Following the AAT review application, discussions occurred between McGarvin and the Authority. Some documents were released to McGarvin. By the time the matter was heard by the AAT, there remained a total of 75 documents still in dispute, of which some were withheld in full and others were the subject of partial release with exempt material deleted.

The various exemptions claimed by the respondent agency were those under s.33A(1)(a) (Commonwealth

State Relations); s.33A(1)(b) (information communicated by a State); s.36 (deliberative documents); s.42(1) (legal professional privilege); s.43(1)(c)(ii) (prejudice to supply of information to the Commonwealth or an agency); and s.45 (material which would found a breach of confidence action).

AAT consideration

The AAT considered all 75 documents on a document by document basis. Its reasons for its decisions run to 65 pages. It is impossible in a short summary to deal with all issues in detail.

The AAT applied the law in relation to the exemptions claimed to each document. In the case of 52 of the 75 documents, the AAT affirmed the Authority's decision that the document in each case was totally exempt. As may be expected, many of the exemption claims upheld related to the Commonwealth-State Relations exemption (s.33A(1)(a) and (b)) and the claim based on common law confidentiality (s.45).

Section 36

Of the 75 documents, a further 12 had their total exemption claims set aside. Of these 12, nine involved the rejection of a deliberative documents (s.36) exemption claim. The following observations were variously made by the AAT in rejecting s.36 claims:

- sensitivity of the content of a document is not of itself enough to sustain a public interest in not releasing the document;
 - the fact that McGarvin was a retired school teacher whose superannuation entitlements may have been adversely affected provided a strong public interest element in release of relevant documents;
 - documents do not necessarily have to be internal to an agency in order to be 'deliberative' for the purposes of s.36, and records of meetings with bodies such as interested trade unions were capable of forming part of the deliberative process. Although the AAT did not refer to the officially published *FoI Act*, it continues to have the heading 'Internal working documents' at s.36;
- there was no public interest in withholding material from an executive minute merely because

some matters discussed were unsettled at the time; the AAT rejected the respondent agency's submission that release may lead to confusion in inhibiting the working of the respondent or the generation of similar documents in future;

- where it is possible that the content of deliberative documents may be confusing or give an incomplete picture, it is still necessary to consider whether an applicant would be capable of placing them in the context of the overall debate and associated issues; such material is still capable of providing a valuable contribution to public debate.

Section 42

The AAT upheld a legal professional privilege exemption claimed by the Authority in relation to a request by a Victorian Department to its legal advisers for legal advice and also to the legal advice which was provided in response. The request and the advice had been provided by the Victorian Department to the Authority essentially for information. The AAT found, notwithstanding that the document had been released to a third party, being neither the client nor the legal adviser, the fact that it was released to only one party and for a specific purpose meant that its character of confidentiality for the purposes of legal professional privilege had not been compromised.

Section 43(1)(c)

In the case of three documents, the AAT rejected claims under s.43(1)(c)(ii) (prejudice to future supply of information to the Commonwealth or its agencies). These documents were briefing notes or letters from the Victorian Trades Hall Council or the Australian Services Union. The AAT noted that neither of these bodies appeared to object to the release of the correspondence. But even if they had, the matters dealt with involved matters commonly understood to be matters dealt with by unions on behalf of their members and the claim that release would, or could reasonably be expected to, prejudice the flow of information to the Commonwealth or its agencies had not been made out.

Section 33A

A further 11 of the 75 documents were the subject of decisions which were

varied by the AAT. Most variations involved a rejection of the deliberative documents exemption as discussed above or the Commonwealth-State relations exemptions contained in s.33A. The sorts of considerations which led the AAT to reject the Commonwealth-State relations claim included:

- a letter from the Victorian Department of Finance, to which the State of Victoria did not consent to release, contained material which had been delivered in a public speech and the exemption claim was not made out because the material was in the public domain; some documents contained summaries of, or references to, the views of the Victorian State agencies but the AAT held these were not consultative in character and the mere reference to them could not have endangered Commonwealth-State relations.

Comment

The reasons for decision are lengthy and involve a detailed consideration of all 75 documents in question. As indicated above, however, no 'new Fol law' is developed. The decision is a good comprehensive application of a range of exemption claims made in relation to a large number of documents generated in a relatively wide consultation process that deals with the controversial question of amendment of superannuation benefits.

The fact that McGarvin was a person whose financial interests were affected by the relevant decisions may well have been a factor influencing the AAT in those areas where public interest components are relevant.

Finally, for what it may be worth as a purely statistical observation, of the 503 documents originally identified by the Authority only 52 were totally withheld at the end of the exercise.

[N.D.]

HAWKE and TELSTRA CORPORATION LIMITED (No. S97/59)

Decided: 27 August 1998 by Deputy President Burns.

Fol Act: Section 24A.

Whether documents exist; whether all reasonable steps to find documents have been taken by an agency; value of evidence given by applicant in circumstances of protracted dispute with agency.

Decision

The AAT affirmed the Telstra Corporation's (Telstra) decision to refuse access to documents on the basis that all reasonable steps had been taken to find documents and that the agency was satisfied the documents either could not be found or did not exist.

Facts and background

Hawke had been involved in a long running dispute with Telstra regarding the efficacy of the services it provided to him.

Hawke sought access to documents under two categories namely:

- linesman's notes and records; and
- notes and test results on his service by technicians at a particular exchange.

Prior to the AAT hearing, the Fol request was clarified and amended to include a third category namely all documents showing faults in a particular area during a particular period.

Telstra released documents in the category of notes and test results. But it was unable to locate, after a search, any documents within the linesman's notes category. Telstra also released various maps and other documents to Hawke although these were considered to be beyond the scope of the Fol request.

During the hearing Telstra heard evidence from its Fol coordinator and also from a senior technician.

AAT consideration

The AAT based its decision to uphold Telstra's decision significantly on the reliability of the witnesses. The AAT found Telstra's witnesses to be impressive and accepted their testimony. This testimony included details by the Fol coordinator of the extent of its search for relevant documents. It also included evidence by the linesman of documents that would exist having regard to the nature of the work.

Concerning Hawke's evidence, the AAT noted that the accuracy of his testimony had been adversely influenced by concerns emanating from his protracted dispute with Telstra. It preferred Telstra's evidence to that of Hawke and, accordingly, affirmed the decision of Telstra.

The AAT referred to the relevant section of the *Fol Act*, s.24A, which provides for an agency to refuse a request where all reasonable steps have been taken to find a document and that the document is either in the agency's possession and cannot be found or simply does not exist.

Comment

This is a very straightforward decision. The *Fol Act* clearly contemplates the reality that documents will sometimes not exist or be incapable of being found. In the Hawke case the AAT found in favour of the respondent on the basis of its being satisfied that reasonable steps had been taken to find any documents that may have existed. Presumably, Telstra did its credibility no harm by releasing all documents that it could find including additional documents which may not have been strictly within the scope of the request.

[N.D.]

Editorial Co-ordinator: Elizabeth Boulton
Typesetting and Layout: Last Word
Printing: Thajo Printing Pty Ltd, 4 Yeovil Court, Wheelers Hill 3150
Subscriptions: \$60 a year or \$40 to *Alt. LJ* subscribers (6 issues)
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Note: Reporting on NSW Fol decisions will be handled in a different manner in the June issue focusing more on practitioner-related issues.