FOI SOLUTIONS

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RECENT CASES (VIC)

Cabinet documents example

In Re The Herald & Weekly Times Ltd and Victorian Curriculum & Assessment Authority, the applicant ("HWT") sought access, from the Victorian Curriculum & Assessment Authority ("VCAA"), to a copy of the median and mean AIM Test results and 5 year trend data, for year 5 students in 2003, on an individual school basis for over 1800 Victorian schools. If released, the documents would enable a comparison of each school with other named schools on the basis of the test results, and the development of comparative school 'league tables'.

The documents sought did not exist in the possession of the VCAA. However, the documents could be produced using computers and software ordinarily available to the VCAA, under s 19 of the Act.

The outcomes and responses for each student sitting the AIM Tests are stored on the VCAA's computer systems. The raw score data for each student are provided electronically to the VCAA's Information Technology Branch. These data are then run through a software program that enables a series of different reports to be generated ("report generating software").

The VCAA provides the Minister with a detailed written report of the performance of schools. It also provides a CD containing the raw score data and the report-generating software. From this CD, a full set of reports for each school and various comparative reports – including the documents sought by HWT – are able to be produced.

Each member of the Social Development Committee of the Cabinet also receives a full written report, a written summary of the report and a copy of the CD provided to the Minister.

The Tribunal affirmed the decision in *Mildenhall and Department of Premier & Cabinet (No 1)* (1995) 8 VAR 284 (*Mildenhall*), that a document may attract the Cabinet document exemption if submission for consideration by the Cabinet was *one* of the *substantial* purposes for its preparation. It is not necessary to show that submission to the Cabinet was the sole purpose for its preparation.

The Tribunal held that, where it is a CD that is provided to the Cabinet for its consideration and the CD is capable of producing the document in dispute, the document (whether in fact produced from the CD or not) can properly be characterised as a 'draft' of, or as 'contain[ing] extracts from', the CD.

The documents were exempt under sections 28(1)(b) and (c).

'Purely factual material'

In *Re The Herald & Weekly Times Ltd and Victorian Curriculum & Assessment Authority*, the Tribunal confirmed that a document that has *any* features other than 'statistical, technical or scientific material' will not come within section 28(3) of the Act, because it does not contain material that is '*purely* statistical, technical or scientific'. Thus, such a document will remain exempt.

Where there is an element of 'subjective' assessment in the material it is not 'purely statistical material'. The Tribunal accepted that the marking of the AIM tests involved subjective assessment by the examiners.

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Internal working documents: ministerial briefing papers

The case of *Re Perton and Department of Education* involved documents relating to the issue of fire sprinkler systems in schools. After a spate of fires in Victorian schools, and in response to two particular school fires in early 2003, the Metropolitan Fire Brigade had recommended that automatic fire sprinkler systems be installed in all school buildings throughout the State.

The applicant was the Shadow Minister for Education. He sought, from the Department of Education ("Department"), access to all documents relating to the "conduct and outcomes of a study on the issue of installing sprinkler systems in school buildings promised by the Minister for Education and Training on 2 March 2003".

The Department treated the request as covering a briefing paper requested by the Minister for Education, and prepared in July 2003, addressing the issue of installing sprinkler systems in school buildings ("the document"). The document proposed two options to the Minister with respect to sprinkler installation.

The Tribunal held that a document prepared for the purpose of briefing a Minister on a particular policy issue will ordinarily satisfy the requirements of s 30(1)(a) of the FOI Act, and therefore constitute an 'internal working document'.

But the Tribunal emphasised that, by enacting s 30 of the FOI Act, the Parliament did not grant a blanket exemption to all Ministerial briefing papers without proof that disclosure would be contrary to the public interest: "Instead the Parliament granted only the very heavily qualified exemption under Section 30(1) for internal working documents. The only species of Ministerial briefing papers which are given a blanket exemption are those which relate to matters to be considered by Cabinet. See Section 28(1)(ba)."

In determining whether a Ministerial briefing paper is exempt under s 30(1) it is necessary to consider, not only the question of the nature and status of Ministerial briefing papers in general, but also the particular features of the Ministerial briefing paper in question.

The Tribunal affirmed that the following factors are relevant to a determination of whether disclosure of an internal working document would be contrary to the public interest:

?? the right of every person to obtain access to documents under the Act
?? the degree of sensitivity of the issues involved in the consideration
?? the stage of the policy development process at which the communication was made
?? whether disclosure would be likely to inhibit frankness and candour in the making of communications
?? whether disclosure would lead to confusion or unnecessary debate having regard to possibilities discussed
?? whether disclosure would give merely a partial, rather than complete, explanation for the taking of a particular decision
?? the likelihood that disclosure would inhibit the independence of officers or the making of proper and detailed research and submissions by them
?? the likelihood that disclosure would create mischief in one way or another, such as mischievous interpretation;
?? the significance of the document, e.g. whether it is or is not merely a draft document.

The Tribunal dealt with a number of these factors. The Tribunal regarded the issue of school fires as very sensitive, because the "damage done by school fires goes beyond the financial cost of replacement of buildings and inflicts great emotional trauma on the whole school community". This weighed in favour of disclosure.

For a number of reasons, the Tribunal concluded that disclosure of the document would not be likely to inhibit frankness and candour in the making of communications in the future, nor lead to misconceived debate.

First, the opinion or recommendation communicated in the document had in fact been adopted by the Minister, albeit in a modified form.

Second, all the Minister's reasons for adopting that opinion or recommendation were apparent from the document.

Third, the Tribunal noted that, where an opinion or recommendation communicated in the document is already "well and truly in the public domain" disclosure is also unlikely to inhibit frankness and candour in communications between public servants and Ministers or lead to misconceived debate.

The Tribunal also concluded that disclosure of the document would not be likely to inhibit the independence of officers or the making of

proper and detailed research and enquiries, because the document canvassed matters of legitimate public concern without raising any extreme or unexpected opinions.

Ordinarily, the fact that a Ministerial briefing does not reflect the 'final word' of the Minister on the issue with which it deals will weigh heavily against disclosure. However, in this case, the existence of a later, revised briefing, dealing with the same issue, did not preclude disclosure of the earlier briefing. This was so for two reasons. First, the Department could not offer an assurance that the revised briefing would be released. Second, the revised briefing did not negate or contradict the earlier briefing, but merely modified and developed it. Thus, even if the later briefing were ultimately released, it would simply reveal the natural development of policy, and not create confusion or lead to ill-informed debate.

The Tribunal considered that the fact that the Minister had mentioned the existence of the review that gave rise to the document in dispute, in response to a question in the Parliament, also weighed in favour of disclosure. The document was not exempt under s 30(1).

Internal working documents: a new basis for the 'frankness and candour' argument

In *Re Giudice and Environment Protection Authority*, the applicant was an existing employee of the Environment Protection Authority ("Authority"). He and another officer, Mr S, had been subject to internal disciplinary procedures. When asked to make submissions on penalty, Mr S sent a letter to the Authority that also contained allegations against the applicant. That was disregarded as the allegations were outside the scope of the inquiry. The applicant sought access to the letter.

The Tribunal affirmed that documents (including the letter) provided during internal investigations on disciplinary or staffing issues containing opinion or consultation or deliberation form part of the deliberative processes of an agency.

In considering whether disclosure of the letter would be contrary to the public interest, the Tribunal accepted the argument that disclosure of the letter would be likely to inhibit frankness and candour in the making of communications by persons subject to internal disciplinary procedures and the agency.

In recent years, the frankness and candour argument has been met with increasing scepticism in the Tribunal and the Supreme Court, as officers of agencies have come to be regarded as obliged to make full and frank communications as part of their employment, irrespective of the risk of disclosure. In this case, however, Mr S was not obliged to write the letter or communicate the information it contained to the agency by virtue of his employment. Rather, this was a situation in which the officer had some choice about whether he would make the communication to the agency, and about the degree of candour and frankness with which he would make it.

Thus, this case suggests that the possible inhibition of frankness and candour is more likely to be accepted as a relevant public interest ground, where a document consists of a discretionary communication, as opposed to a communication that was required in the fulfillment of an officer's duties. The Tribunal held that the document was exempt under section 30(1).

In *Re Koch and Swinburne University***,** the frankness and candour argument was accepted on the same basis. In this case, the applicant sought access to a report prepared by an independent firm ("Garside") engaged by Swinburne University ("University") to investigate complaints made by the applicant, who was an employee of the University.

The University staff interviewed in relation to the investigation were not required to provide information to Garside in fulfilment of their duties as officers of the University. Rather, they participated and provided information on a "purely voluntary basis and not under compulsion". The Tribunal stated that this was a situation in which

"the individuals who were interviewed by those who prepared the report had a choice about the degree to which they were candid and frank, therefore it involved discretionary communications and not one that was required in the fulfilment of an officer's duty".

The Tribunal held that, as such, disclosure of the report would lead the University to suffer considerable disadvantage in trying to persuade 'volunteers' to provide information of a similar kind in the future. The report was exempt under s 30(1).

Legal professional privilege and waiver

In *Re Adelaide Brighton Cement Limited and Victorian Rail Track* the applicant sought access to documents relating to a railway line constructed under a specific Act to carry

goods. A predecessor to the applicant originally owned the land upon which it was built. The Act in question provided that if the railway closed the land reverted to that owner. A Supreme Court dispute exists in relation to those matters between the parties. Eighteen of the documents related to legal advice provided in relation to the dispute.

The Tribunal held that a document would be privileged from production in legal proceedings, on the ground of legal professional privilege, where its disclosure would reveal communications between a client and its lawyer that were made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

A party claiming the benefit of the privilege may waive the privilege, either expressly or through its conduct. However, a party does not waive the privilege attached to legal advice by merely referring to the fact that advice has been obtained. This is because there is no unfairness to the other party flowing from the making of such references, unless the precise advice has been disclosed.

Thus, a document containing a statement referring to the fact that advice has been obtained does not constitute a waiver of legal professional privilege in respect of that advice. The Tribunal held that the documents were exempt under section 32.

Granting access in a form other than that requested

The applicant in *Re Minogue and Department of Justice* was a prisoner at Port Phillip Prison ("Prison"), and is now a prisoner at Barwon Prison. He sought, from the Department of Justice ("Department") access to, and copies of, every operational instruction for the Prison that had been endorsed by the Office of the Correctional Services Commissioner. He accepted that parts of those instructions concerned security protocols at the Prison and were exempt under s 38 of the Act.

The Department granted access to the balance of the operating instructions ("manual"), but by way of an opportunity to inspect the documents at the Prison library, rather than the provision of copies. The Department refused to grant access by way of copies pursuant to s 23 of the Act, on three bases.

First, to provide copies would interfere unreasonably with the operations of the Department.

Secondly, to provide copies would involve an infringement of copyright subsisting in the private company that operates the Prison, Group 4 Correctional Services.

Thirdly, to provide copies would not be appropriate given that the manual is a loose-leaf document requiring continuous updating.

The Tribunal emphasised that section 23(2) confers a qualified right on an applicant, who requests access to a document in a particular form, to be given access in the form requested.

However, section 23(3) also confers a power on an agency to refuse to provide access in the form requested by an applicant and to provide access in another form, in certain circumstances. The exercise of this power is conditional upon the agency being satisfied that at least one of the exceptions in s 23(a) to (c) applies to the form of access requested.

s 23(3)(a) – Unreasonable interference with the operations of the agency

The question of whether granting access in the form requested would interfere unreasonably with the operations of the agency depends on two matters: whether the form of access requested would interfere with the operations of the agency, and whether any interference would be unreasonable.

Interference with the operations of an agency may be caused by the actual provision of access in the form requested or by the future consequences of the provision of access in the form requested.

The 'operations of the agency' extend beyond the narrow, administrative operations of an agency to its substantive functions. In this case, the Tribunal held that the provision of access to the manual in the form of a copy would interfere with the operations of Group 4, by having a deleterious effect on the good order and management of the prison or by adding a potential risk to the welfare of prisoners.

The provision of access in the form requested may also interfere with an agency's operations by creating a 'bad precedent'. The provision of access in the form requested will create a precedent where it is likely that it would lead to a substantial number of other applications to the agency for access to the same document in the same form. A precedent will be 'bad', where dealing with those applications – by either denying or granting access to subsequent applicants – would interfere with the operations of the agency.

The question of whether interference with the operations of an

agency is unreasonable requires consideration of both the benefits and disbenefits of providing access in the form requested. Thus, in addition to any disbenefits to the agency, it is also relevant to consider whether providing access in the form requested would give rise to any real benefit to the applicant.

s 23(3)(b) – Detrimental to preservation or inappropriate given physical nature of the document

The exception in s 23(3)(b) turns on the 'physical nature' of the document, not the personal circumstances of the applicant. The physical nature of the document includes the type of document being sought, as well as its size.

In determining whether the form of access requested would not be appropriate, given the physical nature of the document, the context in which access is to be provided is also a relevant consideration.

The Tribunal held that the fact that a document will require updating is not sufficient to establish that the provision of a copy of that document would not be appropriate, since all documents become dated over time.

s 23(3)(c) – Giving access in another form: infringement of copyright

The question of whether granting access in the form requested would involve an infringement of copyright subsisting in a person other than the State must be resolved by reference to s 23(3)(c) of the FOI and the *Copyright Act 1968* (Cth).

The word 'State' is interpreted broadly in order to avoid anomalies in relation to certain agencies, and to advance the purposes of the Act. In particular, the purpose of s 23(3)(c) is to protect the copyright owned by 'true' third parties, that is "third parties which are not State government departments, agencies or instrumentalities".

A subcontractor to government is 'a person other than the State', even though the contract may deem it to be an 'agency' within the meaning of the Act.

An infringement of copyright is only established if the conduct in question, such as copying a document, is engaged in without the express or implied permission of the copyright owner.

The question of whether or not there is an implied licence depends on the contractual relationship between a contractor/subcontractor and the government when the document sought was created, not when it became the subject of an FOI application.

In certain circumstances, the engagement of a contractor or subcontractor by government to produce material that is capable of being the subject of copyright carries implied permission for government to use the material in the manner in which, and for the purpose for which, it was contemplated between the parties that it would be used at the time the engagement was made.

In this case, the contract between the State and Group 4 for the provision of prison management services was entered into for the benefit of the public and prisoners. It carried an implied licence for the Department to copy the manual for the purpose of exercising its powers and fulfilling its duties as a government department including under the Act.

According to the *Copyright Act 1968* (Cth), the State does not infringe copyright subsisting in another person by an act done "for the services of the … State". The copying of a document by a department of the State for the purposes of providing access under the FOI Act is done for the services of the State. Therefore, copying a document in order to provide access to an applicant in the form of a copy does not constitute an infringement of copyright by the State.

The Tribunal concluded that provision of access to the manual by way of a copy would not constitute a breach of copyright subsisting in a person other than the State, and would not be inappropriate given the physical nature of the document. However, provision of a copy would interfere unreasonably with the operations of the Department. Therefore, the decision to refuse access in the form of a copy and to provide access in the form of an opportunity to inspect the manual instead was upheld.

When is disclosure of personal affairs information 'unreasonable'?

In *Re Koch and Swinburne University*, the Tribunal affirmed the decision in *Knight v Secretary of Department of Justice* (unreported, Kellam J (2003) VSC 341), that whether or not the disclosure of personal affairs information would be unreasonable must be determined on the basis that disclosure is to 'the world at large' not merely to the applicant.

In *Re McNamara and Department of Human Services* the applicant applied to the Department of Human Services ("Department") for access to a full copy of a staff duty roster ("roster") for a community residential unit, in which her son resides.

The roster was released to the applicant, after the carers' surnames were removed on the ground that that information was exempt un-

der s 33(1) of the Act.

The applicant contended that she should be granted access to the carers' surnames as a "caring parent seeking only transparent and accountable service". She contended that, as the carers provide very personal care and have access to the intimate details of residents and their families, the Department has a duty to provide the full names of carers.

The Department contended that the release of the carers' first names enabled the applicant to know at any particular time which and how many carers would be working, and that she would not derive any benefit from release of the carers' surnames. It contended that the applicant was not seeking access to the carers' surnames in a genuine attempt to promote the public interest. Rather, based on a history of strong antipathy exhibited by the applicant towards the Department and carers, it was reasonably likely that she would use the information primarily to harass and unduly hinder individual carers in performance of their duties. As such, the Department contended that carers would be subject to an unreasonable invasion of their privacy.

The Tribunal affirmed that the test of the unreasonableness of disclosure, under s 33(1), involves a consideration of all the circumstances relevant to the particular case, as well as the balancing of two competing interests: the individual's right of personal privacy and the basic purpose of the Act, which is to extend, as far as possible, the right of the community to access information in the possession of government agencies.

The interest of the applicant and purpose for which the applicant has requested access to the information must be considered in determining whether disclosure would be unreasonable.

The release of information relating to the personal affairs of any person is more likely to be unreasonable if the applicant seeks access to pursue a particular personal crusade or to embarrass or otherwise harm a person to whom the information relates, or for some other mischievous purpose.

The release of information relating to the personal affairs of any person is more likely to be unreasonable if it is unlikely that the person to whom the information relates would want the information released, or if that person would be caused stress or anxiety by release of the information.

It may also be relevant, to determining whether the release of information relating to the personal affairs of any person would be unreasonable, that releasing the information would ultimately be likely to negatively impact upon the provision of a public service, such as residential care of persons with disabilities.

The Tribunal held that, even if the applicant does seek access to the information for the furthering of genuine public interest objectives, release of the information must actually be capable of promoting those objectives.

The carers' surnames were exempt under s 33.

Disclosure of personal affairs information – endangerment of life or physical safety

Section 33(2A) provides that, in determining whether the disclosure of information relating to the personal affairs of a person other than the applicant would be unreasonable under s 33(1), an agency must consider whether the disclosure of the information would be reasonably likely to endanger the life or physical safety of any person.

Mere fear *of endangerment of life or physical safety is relevant*

In *Re Musso and Department of Justice (CORE)***,** the Tribunal held that a person's *fear* that the applicant or another person may engage in violent recriminations against him or her, if his or her personal affairs information were to be disclosed, is relevant to determining whether disclosure would be unreasonable. This decision suggests that s 33(2A) will be interpreted broadly, so that a reasonable likelihood of endangerment will be relevant to the reasonableness of disclosure, whether that likelihood is judged objectively or subjectively.

In *Re Koch and Swinburne University*, decided shortly after *Re Musso*, the Tribunal confirmed that the words 'reasonably likely' in section 33(2A) should be given their ordinary meaning. They mean "a chance of an event occurring or not occurring which is real – not remote or fanciful".

In that case, the Tribunal did not make a finding as to the actual likelihood of endangerment to the life or physical safety of an interviewee, whose identity could be ascertained from the document and who had expressed concern for his or her physical safety in the event of its disclosure. Nevertheless, the Tribunal concluded that, "even if his/her personal safety is not in danger, he/she certainly has a fear that [his/her] personal safety may be in danger". The Tribunal was satisfied that, as long as such a fear was 'real' and did not arise out of anything that is fanciful, it should be taken into account under section 33(2A).

Thus, it appears that the reasonable likelihood of endangerment can be assessed from an objective

or a subjective perspective. That is, even where, to an outsider, the circumstances do not suggest a reasonable likelihood of endangerment from disclosure of the document, it will be sufficient that a person truly *fears* that disclosure may endanger his or her life or physical safety.

Risk posed by third parties is relevant

In *Re McNamara and Department of Human Services*, the Tribunal held that, in assessing the likelihood of endangerment to the life or physical safety of any person, it is relevant to consider any likelihood of the applicant providing the information to a third party who has a history of intimidation, harassment and stalking of, or violence towards, the person to whom the information relates. This is because release under the Act is release to the public at large.

When deletion under s 25 is 'practicable'

In *Re Giudice and Environment Protection Authority*, it was held that where is it is not possible to delete exempt matter from a document without leaving 'anything meaningful or intelligible', deletion of exempt matter is not 'practicable'.

In *Re Koch and Swinburne University*, the Tribunal confirmed that the deletion of exempt matter is not 'practicable' where "to attempt to edit the document would effectively reduce the document to something which [is] either meaningless, misleading or unintelligible".

In that case, exempt personal affairs information in the document in dispute was "so intertwined with the other information" that to attempt to edit the document would render it "meaningless and possibly even lead the reader … to draw erroneous conclusions". Thus, it was not practicable to delete that information under s 25.

Applying the 'public interest override'

'Public interest override' only invoked in cases of 'imperative necessity'

A number of recent decisions of the Tribunal have affirmed the decision of the Court of Appeal in *Department of Premier and Cabinet v Robert Hulls*, that the public interest override should only be invoked where the public interest necessitates disclosure.

In *Re The Herald & Weekly Times Ltd and Victorian Curriculum & Assessment Authority* the Tribunal emphasised that the public interest override should only be invoked in cases of 'imperative necessity'. Indeed, where a document is held to be exempt under the Act, there is a presumption *against* release under the public interest override.

Again in *Re Giudice and Environment Protection Authority*, the Tribunal affirmed that the public interest must require, necessitate or demand disclosure for the public interest override to apply. It is not enough that disclosure is simply in the public interest. In any event, in that case, the Tribunal held that disclosure would only be in the purely private and personal interests of the applicant. There would be no possible benefit to the community from disclosure, so disclosure was not even in the public interest, let alone demanded by the public interest.

In *Re Koch and Swinburne University*, the Tribunal stated that: *"[t]he override cannot be invoked simply because the Tribunal holds the opinion that it is in the public interest that the exempt document be released. Rather, the question is whether the public [interest] requires the release of the document. That is, demands or necessitates disclosure"*.

The question of whether the public interest necessitates disclosure "may only determined in the affirmative if the considerations of the public interest are so strong as to override those factors that confer exempt status on the document in the first place".

In that case, the Tribunal also confirmed that where there is no public interest in, or disquiet about, the matter with which a document is concerned, and it is only a matter of private interest or curiosity to the applicant, s 50(4) should not apply.

'Public interest override' in cases of legal professional privilege

In *Re Adelaide Brighton Cement Limited and Victorian Rail Track* the Tribunal held that the public interest usually requires that access <u>not</u> be granted to privileged documents:
"… the community in general benefits from agencies being able to obtain frank advice on legal matters, and from both the agency and the provider of the advice having some confidence that the advice will not be made public. It is not in the public interest that agencies receive inhibited or meaningless advice. … It is also to the benefit of the community that, whilst each case must be considered on its merits, those giving legal advice to agencies should usually be able to do so in the confidence that they are protected by such privilege."

'Public interest override' and cases involving prison management

In *Re Musso and Department of Justice (CORE)* the Tribunal affirmed that there is a widespread public interest in the proper administration of the prison system.

Where allegations of violence and misconduct have been made against prison officers and a detailed investigation has been conducted, the public interest will require that access be given to documents relating both to the relevant incident and the investigation, subject to the protection of the privacy of individuals involved. The passage of time between the incident and the application for access (over 4 years in this case) is irrelevant to a determination of whether the public interest requires that access to the document should be granted under s 50(4).

Application for internal review must be made before application to VCAT

In *Re Russell and Transport Accident Commission*, the applicant applied to the Victorian Civil and Administrative Tribunal ("Tribunal") for review of a decision of the Commission without first having applied for internal review.

The Tribunal held that, under s 51(2) of the Act, a person is not entitled to apply to the Tribunal for review of a decision where he or she has not first made an application for internal review under s 51(1).

Since the applicant had not first applied for internal review, his application to the Tribunal was dismissed.

RECENT CASES (COMMONWEALTH)

Refusing a request where it is apparent that the documents sought are exempt

In the case of *Re Papps and Australian Postal Corporation*, the applicant sought access to documents in the possession of the Australian Postal Corporation ("Australia Post"). The applicant's request for access was conveyed to Australia Post in a single letter, but he sought access to documents falling into four categories:

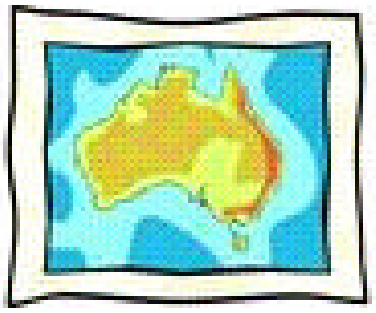
1. "summaries of alleged crimes investigated by the Corporate Security Group in the last 3 years"
2. documents relating to the "number of letters and parcels not delivered to the intended recipient in the last three years, including statistics as to the number believed to have been stolen"
3. documents relating to the "number of letters and parcels screened in last 12 months and results of screenings"
4. documents relating to the "number and nature of prohibited or dangerous goods found during screenings in past three years".

Australia Post granted access to documents coming within categories (2), (3) and (4). However, Australia Post refused to grant access to the documents coming within category (1), under section 24(5) of the *Freedom of Information Act 1982* (Cth) ("Act").

The applicant contended, before the Administrative Appeals Tribunal ("Tribunal") that an agency cannot rely on s 24(5) in respect of *part* of a request, i.e. one category of documents, where the request seeks access to four categories of documents altogether. Rather, the applicant argued that an agency could only rely on s 24(5) where "it is apparent from the face of the request that all of the documents sought are exempt", so that "if it is apparent from the face of the request that at least one of the documents sought may not be exempt … the agency cannot refuse access under section 24(5)".

The Tribunal agreed that, where an applicant has clearly only made one request for access, an agency cannot rely on s 24(5) in respect of part of that single request. However, the Tribunal accepted that an applicant may make a number of separate requests for access in the same letter or facsimile. Where an applicant has made a number of separate requests in the same document, the agency can rely on s 24(5) in respect of documents that fall within one of those separate requests, while granting access to documents which fall within the other requests.

Thus, where an applicant has sent



one letter or facsimile to an agency, requesting access to documents dealing with different matters, the applicant may be making one request or a number of separate requests. The key to determining whether the applicant has made one request or a number of separate requests lies in looking at the language he or she has used, in the context of the types of documents to which he or she has requested access.

In this case, in his letter of request the applicant used the numbers (1) to (4) to list the different categories of documents to which he sought access. Importantly, he used the phrases "the above request" and "this request" to distinguish between the third category of documents and categories (1), (2) and (4). The Tribunal was of the view that, by using this language, the applicant "characterised his letter as containing more than one request".

On the other hand, in introducing

category (2), the applicant said "[as] part of my request I am also seeking…". This phrase suggested that the applicant considered his request for the documents in category (2) as part of the same request in which he sought access to the documents in category (1). However, having assessed this statement in the context of the types of documents to which the applicant was referring, the Tribunal concluded the request for the documents in category (2) "cannot be part of the request in paragraph (1), because the subject matter of the numbered paragraphs (1) and (2) is different".

Thus, where an applicant's letter or facsimile actually contains two or more separate requests for different categories of documents, an agency can rely on s 24(5) in respect of one of those 'requests', while granting access to documents which fall within the other requests.

Documents in respect of 'commercial activities'

In the case of *Re Papps and Australian Postal Corporation*, Australia Post refused to grant access to the documents coming within category (1), on the basis that all of the documents to which that particular request related were exempt documents under section 7 of the Act. This section provides that bodies specified in Part II of Schedule 2 of the Act are exempt from the operation of the Act in relation to the documents referred to in the Schedule.

Australia Post is one of a number of bodies mentioned in Part II of Schedule 2, that is exempt from the operation of the Act "in relation to documents in respect of its commercial activities". Section 7(3) of the Act provides that 'commercial activities' means: "(a) activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments; or

(b) activities, carried on by an agency, that may reasonably be expected in the foreseeable future to be carried on by the agency on a commercial basis in competition with persons other than governments or authorities of governments".

The Tribunal held that the words "in relation to documents in respect of its commercial activities" in Part II of Schedule 2 are capable of being properly understood using the definition of 'commercial activities' in s 7(3) and the ordinary meaning of the words in s 7(4) of the Act.

The Tribunal found that Australia Post's reserved letter service is not a 'commercial activity' as defined in s 7(3)(a). This conclusion was based on the fact that the *Australian Postal Corporation Act 1989* (Cth) ("APCA") provides that Australia Post has an exclusive right to carry standard postal articles. In the sense that the APCA "protects Australia Post from competition with private enterprise in respect of the carriage of a standard postal article by ordinary post within Australia", Australia Post enjoys a monopoly in the provision of that service.

Although standard letters can also be delivered by DX, facsimile and email, the Tribunal found that these were alternatives to (rather than direct substitutes for) the carriage of a standard postal article by ordinary post within in Australia. Thus, in respect of the carriage of standard postal articles, Australia Post could not be said to be in competition with providers of these alternative services.

Australia Post argued that, even if the reserved letter service was not a commercial activity, the investigation by its Corporate Security Group of alleged crimes in relation to that service was nevertheless a commercial activity, as it was undertaken in order to protect the Australia Post brand. Thus, Australia Post argued that the documents sought by the applicant – "summaries of alleged crimes investigated by the Corporate Security Group in the last 3 years" – were exempt because they were documents in respect of its commercial activities.

The Tribunal held that protection of its brand was not the only reason that Australia Post investigates alleged crimes in relation to the reserved letter service. Rather, Australia Post investigates alleged crimes in relation to the reserved letter service because it is obliged, under the APCA, to observe performance standards in the delivery of that service. Monitoring performance and investigating alleged crimes is a necessary part of maintaining those standards and, therefore, complying with its statutory obligations.

Since the investigation of alleged crimes in relation to the reserved letter service was not a commercial activity, the documents sought by the applicant which related to alleged crimes involving that service were not "documents in respect of [Australia Post's] commercial activities". Therefore, Australia Post was not exempt from the operation of the Act in relation to such documents under s 7.

Similarly, in the case of *Re Pye and Australian Postal Corporation*, the applicant sought from Australia Post access to:

"All documents relevant to the sale of the Sandgate Post Officce located in Bowser Parade, Sandgate, Queensland to DM and MG Cross and Tinpike Pty Ltd …".

Australia Post refused to grant access to the relevant documents, on the basis that all of the documents to which the request related were exempt documents under s.7 of the Act.

The activity in question in *Pye* was a transaction for the sale of real property

The scope and character of a particular activity is determined by reference to the powers conferred upon Australia Post under the APCA in order to carry out its functions and comply with its obligations. Thus, if a function can be properly characterised as a commericial activity, then it will follow that transactions conducted by Australia Post in the exercise of its powers to carry out that function will also be commercial activities.

The Tribunal concluded that entering into the contract for sale of the Sandgate Post Office was a commerical activity because it was incidental to Australia Post's provision of, or conducted in the exercise of Australia Post's powers to supply, postal services. The Tribunal appears also to have concluded that entering into the contract for sale of the Sandgate Post Office was a commercial activity in its own right.

Sufficiency of searches

The applicant in *Re Chu and Telstra Corporation Ltd* was a former employee of Telstra Corporation Ltd ("**Telstra**"). The applicant sought access from Telstra to all records in his personal file. Telstra released a file relating to the applicant's redundancy, a file relating to an unfair dismissal case, and his occupational health and safety medical record.

Telstra determined that all reasonable steps had been taken to locate other documents relevant to his request, particularly his personal file, but that they could not be found or did not exist. Thus, Telstra refused access to any such documents under s.24A of the Act.

The Tribunal confirmed that s.24A only requires that "all reasonable steps" have been taken. That means "such steps … to discover the requested documents as are appropriate in [the] circumstances". It does not require the searches conducted to be exhaustive.

In assessing whether the searches that have been made are reasonable in the circumstances, the following factors must be considered:
the subject matter of the documents sought;

- ?? the documents that one would expect to exist, given the subject matter of the documents sought and their expected location;
- ?? the age of the documents;
- ?? the steps already taken to locate them, and the appropriateness or otherwise of further searches;
- ?? whether there are persons in the agency with experience relevant to locating the documents who have not been consulted;
- ?? the willingness or otherwise of the applicant to provide further information to facilitate searches for the documents;
- ?? the purpose(s) for which the request for access was made; and
- ?? the other commitments of the agency in dealing with FOI requests.

The Tribunal's role in assessing what is reasonable "is not to conduct an inquiry into the adequacy or otherwise of [the agency's] record keeping practices". Thus, even if the applicant's personal file had been mislaid, destroyed or selectively released, this did not impact on the reasonableness of Telstra's efforts.

The Tribunal concluded that, taking into consideration the above factors, Telstra had conducted an exhaustive search for the applicant's personal file, and had satisfied the requirements of s.24A in the context of the limitations imposed by its practices and procedures regarding the retention of employee data.

[Note: This matter has been appealed by the applicant to the Federal Court. FOI Solutions will keep you posted on developments.]

Further Information

If you would like any further information about the matters raised in this Newsletter or any assistance with FOI matters generally, please do not hesitate to contact Mick Batskos on tel: 9601 4111 or mobile: 0417 100 796 or fax: 9601 4101 or email: mick@foisolutions.com.au

Your feedback about the Newsletter would be most welcome, as would suggestions about what you would like to see covered in future Newsletters.

You should also keep a lookout for our new website which will be up and running at long last in the next few months.
CHEERS

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