handicapped child so that the child may reach his or her full potential. The applicant had not placed Adam in an institution and continued to carry the burden of appropriate care for him. The arrangements which had been made must be temporary because of the very nature of the problem. The AAT held that the absence was temporary for the purposes of the Act, and referred the matter for reconsideration by the Department.

Application for statement of reasons in respect of decision to refuse to grant a gun licence

In Re Grant and the Commissioner of Police (8 April 1988) the AAT considered an application for review of a decision to refuse to furnish a statement of reasons pursuant to section 28 of the AAT Act. The applicant had applied for a gun licence pursuant to the provisions of the Gun Licence Ordinance 1937 (A.C.T.), which provides that the registrar may grant a gun and pistol licence; but the Commissioner of Police or his delegate has power to certify that he objects to the grant of a licence. If the Commissioner or his delegate so certifies, that certification is the relevant decision in respect of the gun licence and it is that decision which should be the subject of review. On 27 August 1987 a delegate of the Commissioner had certified in writing that the applicant was not a fit and proper person to be the holder of a licence, but that document was not furnished to the applicant until a directions hearing held by the AAT on 26 February 1988. On 28 August 1987 the registrar wrote to the applicant simply saying that an objection had been raised which prevented a licence being granted. On 2 November 1987 the applicant's solicitor sought reasons from the Commissioner pursuant to section 28 of the AAT Act. On 1 December 1987 the registrar declined to give reasons for the decision on the basis that the request was not made within 28 days after the applicant was formally notified of the decision.

The AAT found that the applicant had not been furnished with a copy of the decision until the directions hearing on 26 February. The letter of 28 August did not record the terms of the decision and it was not sent to the applicant by the decision maker. The AAT held therefore that the request under section 28 for a statement of reasons was made within a reasonable time and the applicant was entitled to expect from an arm of government that the right person will notify a decision and that the decision will specify with reasonable particularity what that decision was. The AAT also criticised the complexity of the Ordinance.

Freedom of Information

Conclusive certificate in respect of Australia card Cabinet documents

Recent FOI and Archives Act cases have dealt with the issue of conclusive certificates. In Re Porter and Department of Community Services and Health (14 March 1988) the Shadow

Minister for Health requested access to documents relating to the costs to the private sector of implementing and/or complying with the Australia Card proposal, tax reporting requirements and related legislation. A conclusive certificate under section 34(2) of the FOI Act to the effect that the documents were Cabinet documents, and a conclusive certificate under section 36(3) to the effect that disclosure of the documents would be contrary to the public interest, had been issued.

The AAT discussed in general terms the effect of a conclusive certificate, and stressed the difference between a simple exemption and a case where a certificate had been issued. In the latter case, the Tribunal said, the administration at a high level has claimed and accepted responsibility in a very special way for a decision not to disclose. The role of the AAT in 'certificated' cases is limited to examination of the question whether reasonable grounds exist for the administration's claim. This role is different in character and degree from its role in a simple exemption claim.

The AAT found that the documents were Cabinet documents of a type referred to in section 34 except in respect of the claim that the documents disclosed deliberations of Cabinet (section 34(1)(d)). Deputy President Todd interpreted the term 'deliberations' of Cabinet as what was actively discussed in Cabinet. It could not be concluded there was deliberation on a document merely because the document was before Cabinet at a Cabinet meeting. The AAT also concluded that disclosure of the documents would be contrary to the public interest as it would amount to a breach of the confidentiality applying to the deliberations and processes of Cabinet.

Conclusive certificate under the Archives Act in respect of ASIS documents

In Re Slater and Cox (8 April 1988) the applicant had sought access under the Archives Act to documents relating to the creation and activities of the Australian Security Intelligence Service (ASIS) in the period 1950-1955. The Minister for Foreign Affairs and Trade had issued a certificate pursuant to section 34(1) of the Archives Act stating that he was satisfied that the relevant records contained information which if disclosed could be expected to cause damage to the security defence and international relations of Australia or would amount to a breach of confidence. The Tribunal constituted by Deputy President Todd was therefore only required to consider whether reasonable grounds existed for those claims. Mr Todd cited his comments in Re Porter to the effect that in such a case the Tribunal's role is different in character from that in a simple exemption case. He also noted that, as there is no obligation on government to accept the Tribunal's finding (this being only recommendatory) it would not be difficult for the Tribunal to slide from 'certificate' review into disguised merit review. This would not constitute a proper performance of the Tribunal's duties.

Where the release of documents may have serious implications for national security, a decision about access involves a heavy responsibility on government and on the AAT. Although the media and the academic community are guardians of freedom of speech and of thought they do not bear responsibility for their actions beyond restrictions that are self imposed or imposed by internal codes of conduct. They can walk away from the consequences of an unfortunate or damaging disclosure with impunity, whereas government and the AAT do not have the escape route offered by absence of responsibility.

The AAT then examined a series of FOI and Archives Act cases dealing with the breach of confidence exemption and with release of security documents and documents affecting international relations. It concluded that reasonable grounds existed for the claims made in the certificate. The AAT also concluded that significant and damaging information about the current composition and modus operandi of a nation's security service may be disclosed by release of information about its original establishment many years earlier. A nation that shared security information with Australia could be expected to cease sharing it if it became apparent that the information had been publicly disclosed.

Amendment of personal records under section 48 of the FOI Act

In Re Bleicher and Australian Capital Territory Health Authority (23 March 1988) an applicant who had previously appealed to the AAT in an attempt to amend an internal departmental minute relating to her work capacity, later applied to amend the affidavits presented as evidence in the earlier proceedings. The applicant denied the validity of the opinions expressed in the affidavits about her suitability for employment and proffered more favourable comments from other persons. The respondent refused to amend the documents. On appeal from this decision the AAT agreed that in the circumstances no other decision was possible. The subject documents, once filed with the AAT, had become documents used in the administrative procedures of the Tribunal. The AAT stressed that the section 48 procedure cannot be used as a means of reviewing previous determinations of a respondent agency with which the applicant is dissatisfied and certainly cannot be used to correct or alter a decision made in administrative proceedings by a body other than the agency. An agency has no power to amend a document that constitutes sworn evidence given in proceedings before the Tribunal.

The Tribunal noted the decisions in Re Williams and Registrar of the Federal Court of Australia 8 ALD 219 and Young v Wicks 11 ALN N76, which interpreted the term 'personal affairs' in the FOI Act as relating to matters of private concern and thus as not extending to information relating to a person's work capacity and performance which was 'not private in that sense'. The Senate Standing Committee on Legal and Constitutional Affairs, however, in its report on the operation of the FOI Act, recommended that Part V of the Act, dealing with the amendment of personal records, should not be constrained by any narrow interpretation given to the phrase 'personal affairs' (see pages 231-234 of the Committee's report).

Request for access to 'dob-in' document

In Re Gunther and Secretary to the Department of Social Security (16 March 1988) the AAT considered the provision of the FOI Act protecting confidential sources of information. The applicant, a recipient of unemployment benefit, had requested under the FOI Act a copy of a document which contained anonymous advice to the Department claiming that the applicant was heavily engaged in the construction of shops. The Department had given the applicant access to a document which was a record of a telephone conversation but had made deletions from the document on the basis that the deleted material could reasonably be expected to enable the applicant to identify a confidential source of information in relation to the administration of the law (s37(1)(b)). The applicant appealed against the decision to delete this material. The AAT held that the Department was clearly an agency concerned with the administration of the law, the Social Security Act, and the information was given to it in confidence. The AAT said that the Department in performing its function relies not only on information given by applicants for pensions or benefits but also on other sources of information. Although the AAT could not identify the source of the information from the deleted material this did not mean that the applicant could not reasonably be expected to do so. The deletion was therefore of matter exempt under section 37(1)(b) of the FOI Act.

The Courts

Ministerial decisions to reject AAT recommendations in deportation cases

A number of recent Federal Court cases dealt with the situation where the (then) Minister for Immigration and Ethnic Affairs chose not to accept the recommendation of the AAT in a deportation case. By virtue of section 66E(3) of the Migration Act the AAT, after reviewing a decision of the Minister under section 12 to deport a person, can either affirm the decision or remit the matter for reconsideration in accordance with any recommendation it makes; but cannot set aside the decision. The court has said that the ultimate decision remains that of the Minister and his obligation under the Migration Act is to reconsider the matter in accordance with any recommendations of the Tribunal.

In Haoucher v Minister for Immigration and Ethnic Affairs (9 February 1988) the applicant had been imprisoned for possession of cannabis resin with intent to sell or supply. This led, with the approach of his release, to a decision to deport him. The applicant sought review from the AAT which concluded, after examining the circumstances, that any possible benefit from his removal from the country was outweighed by the hardship to the applicant and his family. The AAT remitted the matter to the Minister with a recommendation that the deportation order be revoked.