NEW SOUTH WALES FoI DECISIONS

District Court

WILSON v. THE DEPARTMENT OF EDUCATION
No. 0119/89
Decided: 19 December 1989 by Judge Smyth.
Request for documents relating to closure of school — claims for exemption under Schedule 1, clauses 6 (personal affairs), 9 (internal working documents), 13 (in confidence communications), clauses 15 (property interests) — effect of prior disclosure documents.

Introduction

This case was the first appeal to the New South Wales District Court from a decision under the *Freedom of Information Act* 1989 (NSW). The appearance of Mr Keith Mason, QC, Solicitor-General, as Counsel for the Department reflected the Government's interest in the case, and the proceedings were watched with much interest by those in NSW hoping for some judicial guidance on the NSW legislation.

In Victoria and the Commonwealth, FoI legislation formed part of an 'administrative law package' which is notably absent in NSW. Although NSW has an Ombudsman's Office and the Premier has promised an Administrative Appeals Tribunal, there are few avenues for review of administrative decision in this State. Wilson therefore presented an opportunity to review both the scope of the FoI Act and the decision-making processes of the Government.

The case raised a number of issues, including the scope of some of the exemptions and the power of the court to direct government agencies to comply with the provisions in the Act as to administrative procedure. It also raised, indirectly, issues about the approach of the District Court and its appropriateness to deal with administrative matters.

Background

Mr Wilson lodged one of the first FoI applications in NSW, and was photographed on the front page of the *Sydney Morning Herald*, complete with application, on the first day of the Act's operation. His request was for documents held by the Education Department concerning the closure of Castlecrag Infants School, an issue of great concern to the local parents and citizens group, of which Mr Wilson was a member.

Several hundred documents were released by the Department initially, and more were released at internal review. Seventy-six documents were outstanding at the time of the appeal. Wilson's application for expedition (on the grounds that the documents would lose their relevance) was granted, avoiding substantial delays awaiting many civil cases in NSW.

Exemptions claimed

The Department claimed that documents were exempt on a number of grounds specified in the Exemption Schedule of the Act. The claim related to cl. 15 (financial or property interests of the State); cl. 6 (personal affairs), cl. 9 (internal working documents), cl. 10 (legal professional privilege) and cl. 13 (confidentiality).

Smyth J dealt with each exemption, but his judgment contained little elaboration on the relevant principles for assessing whether they applied. For instance, he did not advert to the relevant factors to be borne in mind in assessing whether disclosure would be 'contrary to the public interest', despite a number of Commonwealth and Victorian FoI cases on this point. No evidence was received as to whether disclosure would in fact 'prejudice the future supply of information to the Government', as required by the confidentiality exemption. Similarly, he did not refer to any characteristics of the documents the subject of the application, thus reducing the precedent value of the case.

Financial or property interests

Clause 15 of Schedule 1 of the *FoI Act* states that a document is exempt if it contains matter the disclosure of which:

(a) could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an Agency; and

(b) would, on balance, be contrary to the public interest.

Smyth J described the documents which the Department contended were exempt on these grounds as containing information about 'the values of property to be disposed of by the Department and costs of resumption of other properties; and was satisfied that the elements of the exemptions were fulfilled.

Documents concerning personal affairs

Clause 6 of Schedule 1 states that a document is exempt if its disclosure would involve unreasonable disclosure of information about the personal affairs of any person. This exemption is tied to the consultation provision of the Act. Section 31 states than an agency:

> shall not give access to a document containing information about a person's personal affairs unless it has taken such steps as are reasonably practicable to obtain the views of that person as to whether the document is exempt.

The documents in question appeared to contain information about names and addresses of teachers and pupils at certain schools, and it was clear that the Department had not taken any steps to consult the third parties involved.

Smyth J held that the documents in question clearly contained information about personal affairs, but that as the Department had not sought 'permission' of the third parties as required in the Act to release the information, it was exempt, and could not be released.

The aim of s.31 is however not to create another exemption, but to ensure that appropriate consultation takes place before release. There must be unreasonable disclosure of information about a person's affairs for cl. 6 to be satisfied.

Mr Wilson argued that the Department should then be directed to consult with these third parties. Smyth J held that he had no power to make such an order, and made no comment on the Department's inaction.

Internal working documents
Clause 9 provides that a document is exempt if it contains matter the disclosure of which would disclose:

> opinion, advice, or recommendation, obtained, prepared or recorded in the course of the decision making functions of an Agency

if its disclosure 'would be contrary to the public interest'.

Smyth J found that the documents in question fell within the first part of this exemption. A more difficult question arose as to whether their disclosure would be contrary to the public interest.

In the judgment, Smyth J stated:

> the Department has made it perfectly clear that it does not contend that any particular document within that group is of itself, or does contain, material of a sensitive nature, and bases its argument on the claim that it is a class of documents which it would be against the public interest to disclose.

The Department had relied on *Howard and the Treasurer of the Commonwealth of Australia* (1985) 3 AAR 169, in which it was said that there was a class of documents which it would be against the public interest to disclose. This was because there was a real possibility that the knowledge that such a type of document could be disclosed could inhibit the free and frank expression of opinion and would tend to lessen or reduce the range of views that would otherwise be available to the Minister and therefore adversely affect the decision-making process.

Smyth J said there would be some documents containing advice, opinion or recommendation that would contain matter which it would be against the public interest to disclose. Importantly, however, he was quick to dismiss 'class' claims under the Act. He said that where a claim is made under cl. 9, the obligation on the court is to consider each such document and to make a value judgment as to whether that particular document is one which it would be against the public interest to disclose. In this case, he was of the view that none of the documents fell within that category. The claim of exemption therefore failed.

Documents obtained in confidence
Clause 13 states that a document is exempt if it contains matter the disclosure of which:

> (i) would otherwise disclose information obtain in confidence; and
> (ii) could reasonably be expected to prejudice the future supply of such information to the Government or an Agency; and
> (iii) would, on balance be contrary to the public interest.

Smyth J again held, without elaboration, that these documents were exempt.

Legal professional privilege
Smyth J found that a document containing legal advice from the Department's legal officers was covered by this exemption.

Other findings

'Leaked' documents
During the course of the hearing it became evident that copies of documents to which access had been requested and refused by the Department, had in fact been 'leaked' to Mr Wilson from some other source. Judge Smyth commented in the judgment:

> I indicated when this was brought to my attention that I did not propose to give my attention to those documents.

These neutral words do not reflect the heated debate that occurred in the courtroom over this issue. Mr Wilson's campaign against the Government to save his school from closure was well known. Smyth J appeared to infer from this that Mr Wilson's motivation for requesting the documents was primarily political, and he warned Wilson's Counsel:

> If the court's time is wasted because you have the information, then it will be on your head.

Wilson's argument was that the fact that documents had been leaked did not relieve the Department of its obligations to provide the documents under the Act (Transcript, p.30).

Certainly, there are strong arguments that an applicant is entitled to have an application for access to all documents requested determined in accordance with the Act's provisions. An applicant's motives and purposes for which the information is requested are, in general, irrelevant to an FoI application and an applicant does not have to satisfy the court that he does not have the documents, and under s.61 of the Act, the onus of establishing that a decision is justified rests with the Agency.

The case had, however, been expedited, thereby taking priority over other cases in the crowded New South Wales court lists and Smyth J's concern that court time should not be wasted is understandable. However, there is clearly a need for a court or tribunal which can allocate sufficient time and resources to deal in detail with issues and conflicts of this type.

Facts and reasons
Section 28(2)(e) of the Act provides that where a determination is to the effect that access to a document is refused, the Agency must provide reasons for the refusal and findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.

Such reasons and findings are generally seen as being useful for an applicant in preparing an appeal against an adverse decision of an Agency. It is similar to s.13 of the *Administrative Decisions (Judicial Review) Act* (Cth) but is one of the very few legislative requirements in NSW for administrators to provide reasons for decisions. In this case, the Department has conceded that there was no reference to sources in its documentation. Yet Smyth J found:

> I am of the view that when one takes into consideration the original letter purporting to set out the reason for the refusal and relevant findings that the Department has in fact sufficiently complied with its obligation under the provisions of that sub-section.

Even if Smyth J had found against the Department in this respect, Mr Wilson would have had little assistance from the District Court. Smyth J's view was that the court did not have power to give directions in the event of a Department failing to comply with the provisions of the sub-section. Whatever remedy there may be would have to lie by way of prerogative writ.

Costs
Mr Wilson had applied for costs to be awarded against the Department. The *FoI Act* itself makes no provision for costs but the District Court Rules give the right to order costs in an appropriate case. Although Smyth J stated that it may be reasonable to order costs against a Department (or against an applicant) in some instances, in this case it was not appropriate to do so.

Although legal aid is potentially available to any FoI applicant on a low income (subject to normal means and merits test), it is clear

that the prospect of paying even one's own legal costs will be daunting to many applicants and will deter a substantial number of appeals.

Further documents

Mr Wilson requested an order that the Department be directed to search for further documents. Smyth J held that such an order was not necessary. This was despite the fact that a number of fresh documents clearly covered by the application came to light during the case.

Issues raised by the case

Lack of expertise

The *FoI Act* has only been in operation for a year, so there is as yet limited community or judicial knowledge about its provisions.

Mr Justice Smyth admitted early in the proceedings that he 'knew nothing' about the *FoI Act* (Transcript, p.7). Clearly, expertise will develop over a period of time. The Chief Judge of the New South Wales District Court (Staunton J) has expressed interest and has been involved in the preliminary stages of other FoI appeals.

Conclusion

Ultimately, the court found that most of the documents in dispute were not exempt, and Mr Wilson therefore succeeded in his appeal to a large extent. The case, however, did little to advance the knowledge of FoI practitioners or administrators about the interpretation of the NSW Act, and revealed a reluctance on the part of the court to become involved in FoI issues or to play a supervisory role.

When Administrative Appeals Tribunals were first introduced at the Commonwealth level and in the State of Victoria, they were intended to provide quick, non-legalistic and inexpensive review of government decision. Doubt has subsequently been expressed about whether they have in fact lived up to these aims, but they are certainly more accessible to applicants than the District Courts, have the capacity to review decision on their merits, and are staffed by experts in administrative issues.

The Premier has made a commitment to an AAT in New South Wales.

As other appeals are lodged against FoI decisions in NSW, it will be interesting to see how these are dealt with.

[A.H.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

SULLIVAN and DEPARTMENT OF SOCIAL SECURITY
No. N89/232

Decided: 23 May 1989 by Deputy President Bannon.

Request for informant's letter to Department — part of letter but excluding identity of the author disclosed — identity nevertheless ascertainable when the document held up to the light — still exempt under s.37(1)(b).

The applicant sought access to a letter sent to the respondent Department concerning his entitlement to continue to receive an Invalid Pension. In the only part disclosed, it was apparent that the author of the letter informed the Department that the applicant was a citizen of the United Kingdom. This fact did not affect the applicant's entitlement to the pension. On the review by the AAT, the applicant sought access to the information in the letter which would reveal the identity of the author.

In oral reasons, subsequently reduced to writing, the Tribunal found that 'the identity of the informer who wrote the particular letter to the Department, is properly a matter of confidence within the meaning of s.37(1)(b) of the Act'. Mr Bannon cited *Re Sinclair and Secretary, Department of Social Security* (October 1985), and *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. Section 37(1)(b) provides:

> A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to —
>
> (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law . . .

The difficulty arose because the evidence showed that 'by means of holding the released letter up to the light, the applicant has been able to decipher the name of the signatory to the letter'. The applicant argued that the letter 'no longer possesses confidentiality'. The Tribunal found however that 'when he received it he knew, or ought to have known, that the Department was claiming the letter was confidential', and that although he obtained the information as to the identity of the informant innocently, he was not therefore relieved 'of the burden which a court of equity would impose on him of treating the information as confidential'.

The Tribunal affirmed the decision not to disclose the identity of the informant to the applicant.

[P.B.]

ASSOCIATED MINERALS CONSOLIDATED LTD and SECRETARY, DEPARTMENT OF TRANSPORT AND COMMUNICATIONS
No. W89/206

Decided: 26 February 1990 by Deputy President McDonald, I.A. Wilkins, and K.J. Taylor.

Investigations of loss of vessel at sea — records of interview obtained by investigator — s.40(1)(d) — whether evidence showed substantial adverse effect — likely future reactions to disclosure considered.

Following the loss of a vessel, the MV Singa Sea, an officer of the respondent, a Mr Filor, the Director of the Ships Operations Section, was appointed to conduct a preliminary investigation into its loss. By s.377A of the *Navigation Act* 1912, Mr Filor possessed power to 'coerce' persons to give oral evidence on oath, or to produce documents. Apparently some 20 persons were interviewed and gave information without any need on Mr Filor's part to use these powers.

The applicant sought access to various documents which included all the records of these interviews. The respondent contacted all the