Section 25A(5) and the *Casino Authority* case A case of bad luck for Victorian agencies?

Introduction

Section 25A(5) of the Victorian *Freedom of Information Act 1982* (the Act) provides that an agency may refuse to grant access to documents in accordance with a request, without having identified any or all of those documents and without specifying, in respect of each document, the provision or provisions under which that document is claimed to be exempt if:

(a) it is apparent from the nature of the documents as described in the request that all relevant documents are exempt documents; and

(b) either:

(i) it is apparent from the nature of the documents as described in the request that there is no obligation to provide access to an edited copy of the documents; or

(ii) it is apparent from the request or from consulting with the applicant that the applicant does not seek access to an edited copy of the documents.

Section 25A(5) is designed to enable the agency to avoid unnecessary work where it is clear as a matter of logic that all of the documents sought are exempt.[1] The scope of this section, and the role of the Victorian Administrative Appeals Tribunal (the Tribunal) on review of an agency's decision under that section, were recently considered by the Victorian Court of Appeal in *Victorian Casino and Gaming Authority v Hulls*.[2]

Th scop of s.25A(5)

Broadly speaking, an agency may refuse to process a request under s.25A(5) if two conditions are satisfied.

The first condition is that it must be apparent from the face of the request that *all* of the documents sought are exempt. It follows that, if it is apparent from the face of the request that *at least one* of the documents sought is not exempt, the first condition is not satisfied and the agency cannot refuse to process the request under s.25A(5).

The second condition is that it must be apparent from the face of the request that there would be no obligation to provide the applicant with an edited copy of *any* of the documents sought (unless it is clear from the face of the request or from consultation with the applicant that the applicant would not wish to have access to such a copy). Section 25 of the Act deals with edited documents. That section provides that, where it is reasonably practicable to edit an exempt document by deleting the exempt parts, the agency must provide the applicant with a copy of that document (unless the agency considers that the applicant does not seek access to such a copy).[3] It follows that, if it is apparent from the face of the request that s.25 of the Act would require the agency to provide the applicant with an edited copy of *at least one* of the documents sought (and the applicant has not indicated during consultation that he or she does not seek access to such a copy), the second condition is not satisfied and the agency cannot refuse to process the request under s.25A(5).

In the *Casino Authority* case at first instance, the Tribunal held that an agency may not refuse to process a request under s.25A(5) unless a third condition is satisfied: namely, that it is apparent from the nature of the documents as described in the request that they 'will not be or cannot be released in the public interest pursuant to s.50(4)'.[4] The Court of Appeal overruled this part of the Tribunal's decision, correctly observing that s.25A(5) is not qualified by the possibility that an agency might have the power, akin to the 'public interest override' power in s.50(4), to grant access to a document 'which is otherwise exempt if of opinion that the public interest so requires'.[5]

It is clear, then, that an *agency* is to have no regard to s.50(4) when considering whether to make a decision under s.25A(5). But, according to the Court of Appeal, that does not mean that the *Tribunal* is to have no regard to s.50(4) on appeal from such a decision.

The role of the Tribunal on appeal

The issue of the Tribunal's role on appeal from an agency's decision to refuse to process a request under s.25A(5) lay at the heart of the Court of Appeal's decision in the *Casino Authority* case.

Counsel for the Casino Authority argued that the Tribunal's role on review of an agency's decision under s.25A(5) was limited to determining whether access ought to be refused under that section. It was contended that the public interest override had no room for operation in such a review because the documents to which the request related were not yet identified. Counsel went on to argue that if the agency's decision under s.25A(5) was not affirmed by the Tribunal, the agency would be forced to process the request. If, after identifying, locating and collating the relevant documents the agency decided to refuse access to some or all of those documents, *that* decision would be reviewable by the Tribunal. At *that* stage (but not before), the Tribunal must consider first whether the documents were exempt and, if so, whether there should be editing under s.25; and second, whether the public interest required that access be granted to documents that were otherwise exempt.

Counsel for Mr Hulls argued that the Casino Authority's view of the Tribunal's role was far too narrow. Counsel argued that the Tribunal had all the powers of the agency in respect of the request, which meant that the Tribunal could go beyond the power referred to in s.25A(5). In fact, the Tribunal had to consider first, whether the case fell within s.25A(5); second, whether the documents were exempt and, if so, whether there should be editing under s.25; and third, whether the public interest required that access be granted to documents that were otherwise exempt.

It would appear, then, that the main difference between the parties was one of timing. The Casino Authority took the position that the review was, in effect, a two-stage process. The first stage of the review required the Tribunal to decide whether to affirm the agency's decision under s.25A(5). If that decision was not affirmed, the agency would be required to process the request. If the agency decided to refuse access to any of the documents that fell within the request, the second stage of the review required the Tribunal to review that decision to refuse access. Mr Hulls, by contrast, argued that the Tribunal's role on review was not divided into stages. Rather, the matters that the Casino Authority suggested should be dealt with in two hearings had to be dealt with at the one hearing.

The Court accepted that 'there is no wholly satisfactory solution to the problem of statutory construction to which these submissions give rise'. According to the Court, it was difficult to see how the public interest override could have any room for operation if the Casino Authority's submissions were accepted. But if Mr Hulls' submissions were accepted, the benefits conferred by s.25A(5) are lost once the matter proceeds to the Tribunal. This is because the questions of whether documents are exempt and, if so, whether the public interest requires their release cannot be answered unless the request has been processed. Thus, an agency that refuses to process a request under s.25A(5) may in fact be worse off if the matter proceeds to the Tribunal for review. As the Court correctly observed (at 10):

> What was intended to save the agency from a substantial diversion of resources from its ordinary operations will then operate simply to defer the tasks from which it is otherwise relieved, re-creating them in the context of a Tribunal review where the diversion of resources can only be the greater.

After noting that Parliament chose not to exclude s.25A from the operation of the public interest override (and that this perhaps indicated that the override was not to be displaced on review by the Tribunal of an agency's decision under s.25A(5)), the Court held that the submissions of Mr Hulls were to be preferred to those of the Casino Authority. Accordingly, the Court held that:

> the Tribunal, upon reviewing a decision of an agency under s.25A(5), is 'at large' and is not constrained to a consideration of that section; and
>
> the Tribunal may call for the documents under s.56(1), or give a direction that the documents be identified and the grounds for exemption specified, 'notwithstanding that until the matter was taken on review, the agency had the benefit of s.25A(5) and was relieved of that burden'.

With respect, it is difficult to accept the correctness of the Court's decision in this regard. Whilst it must be conceded that the resolution of the apparent conflict between s.25A(5) and s.50(4) is — as the Court stated — not without difficulty, it is almost inconceivable that Parliament intended that the Tribunal's role was 'at large' so that an agency may rely on the benefits conferred by s.25A(5) at first instance and on internal review, but not (in effect) when the matter proceeded to external review before the Tribunal. That this is so is underscored by the fact that the Court's reasoning would appear to apply to the Tribunal's role on review of an agency's decision to refuse to process a voluminous request under s.25A(1).[6]

In my view, the powers of an agency set out in s.25A(1) and s.25A(5) are threshold powers that allow an agency to refuse to process a request. The stated purpose of s.25A is to 'curb unreasonable demands on agency resources'. This purpose would be severely undermined if the Tribunal on review of a decision under s.25A could (and, as the Court seems to suggest, should) simply force the agency to process the request without first considering whether the agency's decision should be affirmed.

As a matter of logic, this question (of whether the agency's decision to refuse to process the request should be affirmed) must itself be considered as a threshold question by the Tribunal on review. If it were otherwise, and the agency was forced to process the request without that question being considered, the benefits conferred by s.25A would be lost permanently. This is because an agency may not and presumably would not seek to refuse to process a request under s.25A that had already been processed. This result frustrates rather than promotes the stated purpose of s.25A.

It follows that the first task of the Tribunal must be to decide whether or not to affirm the agency's decision under s.25A. In my view, the public interest override has no part to play in this exercise; it is impliedly excluded. This is because s.50(4) is to be exercised in relation to specific identified documents that are exempt, whereas s.25A absolves the agency from identifying specific documents at all.

If the Tribunal affirmed the agency's decision to refuse to process the request, then that is the end of the matter: the request need not be processed. But if the Tribunal refused to affirm the agency's decision, then it is *at that point* (and not before) that the agency must process the request. Because of the resources required and time involved in processing a request, the Tribunal would presumably adjourn the matter and order the agency to make a decision on the request within a reasonable period of time.

If, after processing the request, the agency decided to claim that any or all of the documents were exempt, the Tribunal would presumably conduct a final hearing on whether *that* decision should be affirmed (at which time, of course, the public interest override operates in the usual manner). Thus, it is difficult to see how the Court took the view that the public interest override could have no operation if this approach were adopted. Whilst it is true that the override has no operation at the first stage of the review process (and correctly so), it is fully operational at the second stage of that process.

As a practical matter, the agency and the applicant must prepare fresh[7] witness statements and statements of public interest grounds before the hearing on the second stage of the review took place. The time involved in processing the request and preparing fresh witness statements and statements of public interest grounds provides a further reason for concluding that, from a practical perspective, a hearing on whether an agency may rely on s.25A *and* on whether the documents are exempt cannot be heard at the same time. Either the Tribunal ignores the agency's claim under s.25A (which appears to be the result that flows from the *Casino Authority* case),[8] or the Tribunal's role on review must be regarded as a two-stage process.

Conclusion

It follows from the above that the Court's interpretation of the Tribunal's role when conducting a review of a decision under s.25A(5) may create significant difficulties for agencies that have sought to rely upon important benefits conferred by s.25A. In my view, the Victorian Parliament should seriously consider amending the Act to overrule the Court's decision in this regard. In the meantime, it is to be hoped that the Tribunal recognises that, whilst its role on review is technically 'at large', it is nevertheless preferable to consider whether the agency's decision to refuse to process the request should be affirmed as a preliminary or threshold question.[9]

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References

1. See Commonwealth Attorney-General's Department, *New FoI Memo No. 19 — Preliminary and Procedural Points,*

(December 1993) at para 8.20; the Casino Authority case at 10.
2. Unreported, Court of Appeal, Brooking, Phillips and Batt JJA, 3 April 1998.
3. For an indication of what is meant by the phrase 'reasonably practicable' see *Re Police Force of Western Australia v Winterton,* unreported, WA Sup Crt, Scott J, 27 November 1997.
4. *Re Hulls and Victorian Casino and Gaming Authority* (1997) 11 VAR 213 at 224; (1997) 67 *Fol Review* 6. Section 50(4) of the Act empowers the Tribunal to order the release of most exempt documents if the public interest 'requires' their release. This power is known as the 'public interest override'.
5. The *Casino Authority* case at 7.
6. Except perhaps to the extent that the Court referred to the power to call for exempt documents under s.56 of the Act. That section has no application in relation to an application for review of a decision made under s.25A(1) because such an application does not constitute 'proceedings ... in relation to a document that is claimed to be an exempt document' within s.56(1).
7. The agency's witness statements for the first stage of the process will be quite different from the witness statements for the second stage of the process. This is because the witness statements for the first stage can speak only in general terms of the as yet unidentified documents (the focus being on why the agency may refuse to process the request), whereas the witness statements for the second stage will refer with some particularity to the documents in dispute (the focus being on why those documents are exempt and, in most cases, why the public interest does not require their release).
8. During argument the Court itself indicated that 'there may be little point in some cases, if not in all, in the Tribunal's considering whether the case fell within s.25A(5)' if Mr Hulls' arguments were accepted, which they of course were: the *Casino Authority* case at 9.
9. In fact, my experience in the Tribunal accords with this approach.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

COWLING and DEPARTMENT OF HUMAN SERVICES (No. 97/44102)

D cid d: 4 March 1998 by Presiding Member Mattei.

Section 32(1) (legal professional privilege) — Section 50(4) (public interest override).

Factual background

Cowling was a borrower under the Ministry of Housing's Capital Indexed Loans scheme. This scheme, which was introduced in 1984 in order to benefit low income earners, was found to be seriously flawed. The way in which interest was calculated on the loans made under the scheme was a cause for particular concern.

In a letter dated 23 June 1997, an officer of the respondent Department informed Cowling that a new formula would be used to calculate interest on her loan. The correspondence noted that the Department had obtained and relied upon legal opinions as to how interest ought to be charged prior to settling on this formula. There were, in fact, five separate legal opinions and or memoranda of advice relied upon (the Documents).

Proc dural history

Cowling sought access to the Documents. The Department claimed that the Documents were exempt under s.32(1) and Cowling applied to the Tribunal for review. At the hearing, Cowling conceded that the Documents were exempt under s.32(1) but contended that the s.50(4) public interest override operated so as to compel access.

The decision

The Tribunal affirmed the decision of the Department.

The reasons for the decision

Section 50(4)

Affirming the decision in *Re Chadwick and Department of Property and Services* (1987) 1 VAR 444, the Tribunal held that a document protected by legal professional privilege will not be released under s.50(4) unless 'public interest grounds of a high order' are present. In the circumstances of the case, the Tribunal concluded that the public interest did not require the release of the Documents pursuant to s.50(4).

In particular, the Tribunal noted that the fact that the issues canvassed in the Documents were potentially litigious — and indeed at the time were the basis of an action in the County Court — militated against the invocation of the public interest override. It was also of significance that the conclusions expressed in the Documents were arguable. In this context, the Tribunal distinguished *DPP v Smith* [1991] 1 VR 63, finding that in that case the mere existence of the legal advice, and not whether it was right or wrong, was crucial to the conclusion that the public interest required access to the documents in that case.

[C.P.R.]

GILLESPIE AND MELBOURNE PARKS AND WATERWAYS (No. 1997/04023)

Decided: 27 March 1998 by Pr - siding Member Davis.

Section 30(1) (internal working documents) — Section 34 (commercial documents) — Section 50(4) (public interest override).

Factual background

The respondent Melbourne Parks and Waterways is a statutory corporation that trades as 'Parks Victoria'. It is responsible for managing Victorian parks and for granting leases and arranging construction and development projects on Victorian parkland.

In 1994–1995, Parks Victoria granted several leases over land in Albert Park, including a lease for the development and construction of 'The Point' restaurant, a lease for the development and use of a golf course and driving range, and a lease for use of certain land as a soccer stadium. Parks Victoria also arranged for the construction of a fountain on Albert Park Lake.