Section 33

Document 2 contained the names of employees of the Council, the title of the position in which they were engaged and the salary band pertaining to the employee, indicated by reference to a number. The Council argued that the salary bands referred to in Document 2 were exempt from disclosure under s.33. Section 33 exempts a document if disclosure would involve unreasonable disclosure of information relating to the personal affairs of any person. The Council argued that the salary bands in Document 2 indicated the range of the salary of a particular employee. This, it was contended, was a matter of personal privacy.

The Tribunal rejected the Council's argument. The Tribunal specifically noted that 'a description of the position which a person occupies within the hierarchy of the [Council and] ... a reference to a band number being the range of salary applicable to such a person is not a personal matter of the individual who occupies that position'.

Section 34(4)

The Council further argued that the salary bands referred to in Document 2 were exempt from disclosure under s.34(4) of the Act. Section 34(4) exempts a document if, in the case of an agency engaged in trade or commerce, it contains information of a business, commercial or financial nature that, if disclosed, would be likely to expose the agency to disadvantage.

The Tribunal accepted that the Council was engaged in trade and commerce, noting that the Council hired plant, maintained buildings and derived revenue from the provision of various community services. It was further noted in this context that the Council's compulsory competitive tendering teams competed with outside tenderers in respect of certain services.

On the basis that the Council was engaged in trade and commerce, the Council argued that the particular salary bands contained in Document 2 ought not to be released as they had the potential to enable a competitor to calculate the labour costs of 'in-house teams who must submit their tender for contracts to be let by the [Council] from time to time'. This would be likely to disadvantage the Council because it would allow private tenderers to increase their tender above that which they may otherwise have selected 'with confidence that the revised tender would nonetheless be less than that put forward by in-house tenderers'.

The Tribunal accepted the Council's argument and ordered the deletion of all references in Document 2 to relevant salary bands and to EFT (being the designation for equivalent full time positions and the numerals accompanying each reference).

The Council also claimed that Document 3 was exempt under s.34(4). However, the Tribunal was not required to decide on the matter as the DNA agreed to accept a substitute document prepared by the Council providing some of the information requested but excluding sensitive material. The parties agreed that, because of the nature of Document 3, it was not feasible for the Council to release the document in a modified form.

Comments

It is interesting that the Tribunal rejected the Council's argument in respect of s.33 on the basis that information relating to a person's salary is not a matter relating to their personal affairs. In contrast, the Tribunal in *Re Milthorpe and Mt Alexander Shire Council* (1997) 12 VAR 105 held that 'information relating to the remuneration of an officer relates to his personal affairs' (see also *Re Ricketson and Royal Women's Hospital* (1989) 4 VAR 10; *Re O'Sullivan and Department of Health and Community Services (No.2)* (1995) 9 VAR 1).

It should be noted however, that although salary information may relate to a person's personal affairs, there is ample authority that it may not be unreasonable to disclose such information: *Re Ricketson and Royal Women's Hospital* (1989) 4 VAR 10; (1991) 32 *Fol Review* 18; *Re Forbes and Department of Premier & Cabinet* (1993) 6 VAR 53; (1994) 49 *Fol Review* 8; *Re Thwaites and Metropolitan Ambulance Service* (unreported, 13 June 1997); (1998) 73 *Fol Review* 16.

[C.P.R.]

NSW FoI Decisions

Administrative Decisions Tribunal

GILLING v GENERAL MANAGER, HAWKESBURY CITY COUNCIL [1999] NSWADT 23

Decided: 22 June 1999 by N. Hennessy, Deputy President.

Freedom of Information Act 1989 (NSW)

Clause 6, Schedule 1 — personal affairs — does name and address constitute personal affairs — in context of objections to development applications when is disclosure reasonable or unreasonable?

Local Government Act 1993 (NSW)

Section 12 — publicly available information from Councils — right of inspection of Council documents — public interest test on refusal of inspection.

Section 12A — requirement for written reasons for refusal of access – review of refusal decisions within three months.

Background

Ms Gilling owns a caravan park. She has made a number of development applications over the years to improve the park.

Prior to this case in front of the ADT Ms Gilling had lodged three FoI applications seeking copies of objections made to her development applications. The applications had been granted in full, after consultation with the objectors.

The key issue concerned harassment or intimidation of those who objected. Ms Gilling denied she did so. The evidence in relation to previous development applications and the subsequent FoI applications seeking the identity of the objectors,

was that there was oral and written contact with some of them.

The evidence from Ms Gilling was that she contacted residents and reported their views to the Council. The Council tendered evidence claiming residents reported harassment and threats. In one case the resident claimed she had received 'disturbing phone calls' at her workplace and her 84-year-old grandmother had received 'an intimidating telephone call'.

The latest FoI request

Ms Gilling made her FoI application on 29 April 1998 seeking details of who the Council consulted about her development application and copies of letters of objections. The Council, as required, consulted with the objectors and then provided copies of five of the objections in full. Four others objected to release for fear of harassment and intimidation. Two were released with names and addresses deleted and the other two were released after being retyped, with names and addresses released. The evidence showed the Council did not have a written policy addressing access, but the practice was to grant access in full unless there was an objection.

On 24 November 1998, Ms Gilling sought internal review of the application. On 9 December 1998, after further consultation the Council decided to affirm the original decision. On 15 January 1999, Ms Gilling applied to the ADT for review.

Consid ration of the application

In terms of the broad issues the ADT noted the objects of the *FoI Act* favouring access, the onus of proof and the requirements for consultation where applications concerned personal affairs. The ADT emphasised the importance of the decision in *Perrin's case* (1993) 31 NSWLR 606. In particular it cited the comments of Kirby P (as he then was) that the onus of proof lay with the agency to justify withholding documents:

> Prima facie, the document in its entirety must be disclosed. To withhold disclosure it is for the agency to make out the application for an exemption. Thus the question properly is not why the information should be disclosed but why it should be exempted. [at 625]

In relation to the specifics of this case the ADT accepted Ms Gilling's undertaking that she would not contact any of the objectors if their names and addresses were released. It also noted that Ms Gilling contacted objectors to previous development applications to seek information to put to Council but it opined '... some of the people contacted have understandably felt intimidated'. Citizens engaging in debate about their community, however robust, should not expect to be harassed for doing so.

The issue determined by the ADT was whether under Clause 6, Schedule 1 of the *FoI Act* the names and addresses of the objectors were part of their personal affairs and, if so, whether disclosure would be unreasonable.

Names as personal affairs

The ADT considered the essence of the NSW Court of Appeal's decision in *Perrin's case* was that the names of the police officers involved related to their performance of public duties as police officers. It was therefore essential to examine the context in which the names and addresses of residents appear. In *Perrin's case* the 'wall of anonymity of public servants' needed to be breeched. In Ms Gilling's case the ADT said the residents were writing to a council about a development application as private individuals. They were not performing any public duty or responsibility, according to the ADT, although they were entering a public debate involving their community so perhaps the ADT needs to recognise a point between a citizen's public position and their private realm, from which they rarely emerge.

The name and address of the residents was held by the ADT to concern their personal affairs. Such information can still be disclosed unless it is unreasonable to do so, and here the ADT was on firmer ground.

Submissions by residents, and others, enhance the ability of Councils to make informed decisions about development applications. Councils need to be satisfied objections are made in good faith, are not fabricated and are from those affected by a development. Those like Ms Gilling, relying on Council decision making to be open and accountable, need access to the information on which Councils make their decisions. The ADT considered these factors. It noted the Council's decision had a vital impact on Ms Gilling's life and said:

> 51. ...
>
> Unless there are convincing privacy or other reasons for withholding certain information, all the factors taken into account by the Council in making its decision must be known so that the decision is transparent and Council can be accountable for it.

In this case what was the connection between Ms Gilling's application and the process of holding Councils to be accountable?

The ADT noted the Ombudsman's 'FoI Policies and Guidelines' favoured disclosure in these circumstances and cited *Re Mann and Australian Taxation Office* (1985) 7 ALD 698, *Colakovski* (1991) 29 FCR 429 and *Re Green* (1992) 28 ALD 655 in relation to need or interest in documents sought, satisfaction of curiosity and whether reasons for the applications were relevant to the reasonableness of the disclosure.

In *Perrin's case* the ADT mentioned Mahoney J's comment that where the information sought was to enable an applicant to harass a person, the court would have to 'exercise care' about giving access.

The ADT balanced Ms Gilling's entitlement to the information with the public purpose of providing it. The ADT stated:

> 56. If the question of access to names and addresses arose at a time when the development application had not been resolved, I would have had no hesitation in deciding that although the documents contain information concerning personal affairs, disclosure would have been reasonable. The factors favouring disclosure, particularly the achievement of the public interest purposes of the legislation, would have outweighed the factors against disclosure including the views of the objectors and any prejudice or perceived prejudice they may have suffered.
>
> 57. But the development application has been resolved. For this reason the public interest purposes of the legislation will not be served by disclosing the names and addresses of the objectors. In addition, so far as it is relevant, the applicant's interest in the information is merely to satisfy her curiosity. Given that the names and addresses do constitute 'personal affairs' and the views of the third parties is against disclosure, disclosure at this stage would be unreasonable.

The ADT upheld the decision of the Council.

Comment

Nexus between FoI Act and Local Government Act

The ADT dealt with Ms Gilling's quest for information under the FoI Act but noted obligations placed on Councils under the Local Government Act (LGA).

Section 12(1) of the LGA lists publicly available information without the need for an application. Section 12(6) allows inspection of its documents, free of charge, unless it would be contrary to the public interest to do so. Section 12A requires written reasons to be given for refusal and this decision must be reviewed within three months.

The ADT thought the rights under the LGA gave the public greater rights to access than under the *FoI Act*. The problem is that an aggrieved person in relation to the LGA must pursue any remedy in the NSW Land and Environment Court.

The *FoI Act* and the ADT represent a more coherent regime of review of decisions with cheaper and more accessible remedies.The ADT noted:

> 11. Having two separate regulatory regimes for access to Council documents is confusing because the tests for providing access to documents differ. When a person asks for a document, there is nothing to indicate which test should be applied in responding to such a request. If a Council refuses to provide access to a document, the applicant may not be aware that in many cases they have the choice of pursuing the matter under the *FoI Act* to the ADT or under the LGA to the Land and Environment Court.

Quite clearly the two regimes need to be amalgamated.

Memo to the NSW Premier

Sit down with the Attorney-General and the Minister for Local Government and make some decisions to enable the ADT to determine LGA access issues.

If the policy thinking behind the LGA access regime justifies a better scheme of access in relation to Councils then the ADT could be empowered to determine any review decision on the basis of whichever test would give greater access, irrespective of whether the application was made under the LGA or the *FoI Act*.

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

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[N.D.]

OSET and AUSTRALIAN INDUSTRIAL REGISTRY (No. W96/359)

D cid d: 26 February 1997 by Deputy President Breen.

FoI Act: *Section 6; Schedule 1.*

Jurisdiction of AAT — documents in possession of Australian Industrial Relations Commission Registry.

Decision

The AAT has no jurisdiction to hear an application for a review of a decision under the *FoI Act* to refuse access to documents in the possession of the Australian Industrial Relations Commission (AIRC) which relate to issues raised in the course of proceedings before the AIRC, and whose character is probative in respect of those issues. Documents whose character is probative in respect of an issue before the AIRC are not documents of 'an administrative nature' for the purposes of s.6 of the *FoI Act*.

Facts and background

The applicant sought access to documents on the file of the Registry of the AIRC. Oset was a party to proceedings in the AIRC relating to her perceived grievance against her former employer.

The AAT decision is very short and does not contain any details of the background to the application. The decision deals only with the question of jurisdiction.

The AAT asked Oset two specific questions:

- was it Oset's perception that the AIRC held documents relating to issues raised by her in the course of proceedings she had initiated in the AIRC; and

  were the documents held by the AIRC probative of the issues before it?

Oset answered 'yes' to each question.

The AAT decided on this basis that it had no jurisdiction to compel the AIRC to provide to parties to proceedings, copies of documents of evidential quality and character which have come into the possession of the AIRC in the course of the performance by it of its statutory role.

The AAT relied on s.6 of the *FoI Act* which provides, among other things, that tribunals, authorities or bodies specified in Schedule 1 are deemed to be 'prescribed authorities' but that the *FoI Act* does not apply to any request for access to documents in their possession unless the documents in question relate to matters of an administrative nature.

In Oset's case, while the AIRC is a prescribed authority (and therefore subject to the *FoI Act* generally) it is so only in relation to documents of an administrative nature and not to documents whose contents go to the resolution of matters in dispute between parties.

Comment

This decision and provisions such as s.6 (and also s.5) of the *FoI Act* are consistent with the philosophy behind the *FoI Act* of maximising access rights to official documents of