1. Reports to the Adult Parole Board.
2. Correspondence with the Department of correctional Services, Northern Territory.
3. Documents incorporating the names and personal affairs of third parties; and
4. Information provided on a confidential basis.

All of the reports to the Adult Parole Board were claimed under ss.30 and 38. In relation to s.30 it was held that they were provided by officers in the course of their duties for the purposes of the deliberative processes involved in the function of Office of Corrections in administering the parole system of Victoria. The Tribunal then had to consider whether disclosure would be contrary to the public interest. It was held that there was an importance in ensuring the frank and full flow of information for the purposes of the Board and it was more probable than not that the release of this information would have the likelihood of causing officers to omit information from their reports which would be of value to the Board. The Tribunal also held that the reports of Parole Officers were to be viewed in the same way as psychiatric reports considered by *Haigh and Health Commission of Victoria* 1984 (unreported) as vital elements in the making of proper determinations in the administration of the parole system. As such they were held to fall within s.30.

The Tribunal also held that they were exempt under s.38. Section 30 of the *Corrections Act* 1986 had been amended since the decision in *Mallinder and the Office of Corrections* (1988) 2 VAR 566 which had stated that the section did not stipulate with sufficient specificity the nature and quality of information which was not to be disclosed. The section had since been amended to include in the definition of prohibited information, information given to the Board and not disclosed in reasons for the decision. The Tribunal held that the amendment overcame the inadequacy previously perceived to exist.

In relation to the three documents which involved correspondence with the Northern Territory, the Tribunal held that the evidence disclosed a co-operative, mutually advantageous working relationship between the Northern Territory and Victoria in the supervision of parolees. Confirmation was received that the information in one of the documents was provided in confidence and the Tribunal held that disclosure of that or any of the documents would be contrary to the public interest for the working relationship between the State of Victoria and the Northern Territory. They were held to be exempt pursuant to s.29(a) and (b).

The final document consisted of parts of certain file notes of which parts had been released. They were said to relate to parts of a confidential information. The Tribunal stated that on its face it looked unlikely that the information would have been communicated in circumstances where the author would become aware that it was to be disclosed to the parolee. The Tribunal looked at its contents, the circumstances in which it was brought into existence together with evidence to decide that on the balance of probabilities the document was exempt pursuant to ss.30(1), 31(1)(a) and 35(1)(b). Furthermore, the Tribunal held it to fall under s.35(1)(a) and 35(1)(b). As there was no overriding public interest requiring release of the documents the Tribunal affirmed the decision of the respondent.

[K.R.]

SOUTH AUSTRALIAN FoI DECISIONS

District Court of South Australia

EVERINGHAM v DIRECTOR-GENERAL OF EDUCATION
(No. D2650)(DCCIV-92-1909)

D cid d: 13 November 1992 by Bowering J.

Appeal against determination refusing access to documents — refusal by agency to deal with application until advance deposit paid — advance deposit not paid — refusal to deal with an application not a determination — appeal against a determination not yet made — jurisdiction declined.

In accordance with s.12 of the South Australian *Freedom of Information Act*, the applicant sought access to certain documents concerning herself from the Director-General of Education (as Chief Executive Officer of the Education Department) by letter dated 8 April 1992. Section 40 of the Act confers a right of appeal on applicants dissatisfied with the determination of whether access to documents should be provided. Being dissatisfied with the Education Department's determination of her application, Mrs Everingham appealed to the District Court.

At the appeal's hearing, counsel for the respondent submitted that the applicant had no right of appeal, and that the court should decline to entertain the appeal because it was 'legally incompetent'. The applicant was represented by her husband, and although he had no right to appear for his wife before the court, Judge Bowering gave Mr Everingham leave to do so.

The respondent's submission that the *FoI Act* conferred no right of appeal on the applicant was based on the fact that the agency (the Director-General of Education) had not yet made a determination of the type which would confer a right of appeal on her.

In considering the matter, Judge Bowering examined the relevant provisions of the Act (ss.14, 17, 18 and 19).

The judge found that on receipt of the applicant's application, the agency's designated officer estimated the application's likely processing time, and the consequential cost of dealing with it. Because the costing exceeded the $20 application fee (already forwarded with her application as required by the Act) by some $150, the agency invoked s.17(1) of the Act to request an advance deposit from the applicant. The applicant was advised of the agency's decision to seek an ad-

vance deposit by letter dated 24 April 1992, which stated in part:

> It is considered that the cost of dealing with your application may be significant. It will exceed the amount of the application fee. An advance deposit is required to be paid in accordance with the attached invoice. The amount of the deposit has been based on an estimation of at least seven hours of processing time will be needed. The prescribed fee is $7.50 for each subsequent 15 minute period after the first two hours.
>
> The advance deposit is required to be paid on or before 15th May. Your application will only be proceeded with once your payment has been received.

The judge noted that s.14(2) of the Act requires an agency to deal with an application as soon as practicable after it is received, and in any case, within 45 days of such receipt. Failure to so determine means the agency is 'taken to have determined the application by refusing access to the documents to which it relates'. As described by Judge Bowering, this means that on receipt of an application for access to documents 'the 45-day clock commences to tick'. However, with an agency's request for an advance deposit, the clock may be interrupted. Therefore, the period between a request being made and payment of the advance deposit is not taken into account when calculating the 45-day processing period. In Mrs Everingham's case, 'the 45-day clock ceased to tick' once the Education Department issued the letter of 24 April 1992 requesting an advance deposit of $150.

The applicant wrote to the department (6 May 1992) disputing the estimate of seven hours to deal with her application as 'ludicrous'. In addition to seeking reconsideration of the cost, she requested a response within seven days. The Department's reply of 13 May 1992 stated in part:

> The documents you seek are considerable in number and contained in a variety of files located at a number of sites. Irrespective of the form of access requested it is necessary to make a formal determination on every page in relation to the provisions of the Act. Some documents are of the kind which require consultation. Any exemptions claimed must be properly justified.
>
> The time spent so far in processing your application in good faith has already exceeded that estimated for the advance deposit. No further work will be done on your application until the deposit is paid.

On 19 June 1992, the applicant again wrote to the Director-General of Education:

> I submitted an application requesting access to documents in accordance with the *Freedom of Information Act* 1991, by letter dated 8th April 1992.
>
> Pursuant to the provisions of s.17-19 of the Act, your agency has refused me access to documents to which the application relates.
>
> I am aggrieved by the determination made by your agency to refuse me access to the documents, and seek a review of that determination.

The judge presumed that the reference to 'a review of that determination' meant an internal review (s.38 of the Act). After undertaking an internal review, the agency wrote to the applicant on 6 July 1993 stating that it had reviewed the matter and confirming the earlier determination 'to refuse to deal with your request until you pay the required deposit'. It based its decision on Part III of the *Freedom of Information Act* 1991, Division 1, Clause 18(3).

The applicant denied receiving the letter, claiming she did not see it until it was shown to her by her solicitors some time after 20 July 1992, the date on which she instigated her appeal to the District Court. The judge clarified with Mr Everingham that the appeal was not against the determination described in the letter, but against a deemed refusal to supply the documents.

It was Mr Everingham's submission that the determination subject to appeal related to the decision taken by the Director-General of 15 June (as set down in s.19(2) of the Act), since this was around the date when the 45-day period concluded. Further, he stated that because the 45-day clock ceased ticking when the request for the advance deposit was made (24 April) it resumed ticking on 16 May, being the day after the advance deposit was due as per the letter of 24 April. Mr Everingham then argued that the Department's decision not to proceed with the application because of the outstanding advance deposit could not have been made prior to 15 June because the applicant had not breached the request for payment until after that date.

According to Mr Everingham, the Director-General had failed to advise the applicant in writing of the decision not to proceed further with the application (owing to non-payment of the advance deposit) as prescribed by s.18(5) of the Act. Finally, Mr Everingham contended that this failure to act meant the 45-day clock automatically resumed ticking.

In reply, counsel for the respondent argued that the 45-day clock stopped on 24 April and had not resumed since, citing not only the Department's advice to the applicant that an advance deposit of $150 was required, but also the decision to refuse to continue to deal with the application until the payment had been received. In fact, the applicant was further advised of the Department's position on 13 May when it wrote, 'no further work will be done on your application until the deposit is paid'.

While agreeing that a refusal to deal with an application is a determination under s.18(8) of the Act, the judge also noted that it was not the determination which was the subject of Mrs Everingham's appeal. Mr Everingham asserted that Mrs Everingham's appeal related to the determination she believed was made around 15 June.

In turn, the respondent pointed out that the provisions of s.18(8) distinguish between two decisions: first, a refusal to deal with an application, and second, a refusal to continue to deal with an application. Furthermore, it is only the first decision, that is, a decision to refuse to deal with an application, to which the provisions of s.18(5) related. This means the department had not breached the obligation to give notice under s.18(5) because it was not the decision made by the department. The actual decision was made at the time an advance deposit was requested on 24 April, that is, the decision was to refuse to continue to deal with the application until the advance deposit was paid. Moreover, Mrs Everingham could not plead ignorance of the decision since she was advised of the Department's decision twice (letters of 24 April and 13 May). Finally, counsel for the respondent claimed that Mrs Everingham could not properly appeal because no determination in respect of granting access had ever been made. The entire process, it was contended, had 'ground to a halt' once Mrs Everingham failed to pay the advance deposit requested of her.

In summing up, Judge Bowering found the views of the respondent must prevail. He concurred with the respondent's assertion that the Act draws a distinction between a decision to refuse to deal with an application and a decision to refuse to continue to deal with an application. Furthermore, the notice required by s.18(5) applies only to a

refusal to deal with an application and not with a refusal to continue to deal with an application. In agreeing with the position that s.18(5) had no application in Mrs Everingham's case, the judge stated that as a consequence the applicant's claim that the 45-day clock resumed ticking once the Department failed to give notice as per s.18(5) could not stand.

It followed that Mrs Everingham's appeal — being against a determination which had not yet been made — was 'legally incompetent' and the court had no jurisdiction to either hear or determine it. In so deciding, the judge commented that should Mrs Everingham pay the $150 advance deposit (thus reactivating the entire process), and the Department subsequently make a determination which dissatisfied her, then at that point a right of appeal existed.

[V.E.]

EVERINGHAM v DIRECTOR-GENERAL OF EDUCATION (No. D2659)(DCCIV-92-1908)

Decided: 13 November 1992 by Bowering J.

Appeal against determination refusing access to documents — claim by agency that documents are 'exempt documents' — public interest — statement by Minister pursuant to s.42(2).

The applicant, Edward Everingham, appealed to the District Court against a determination of the Education Department of South Australia. He made application to the Director-General of Education for access to records held by the Department relating to him and his career as a teacher and had been granted access to all but 22 documents. Access to these was refused on the basis that the Director-General regarded them as being exempt documents. The applicant was dissatisfied with both the determination and the result of the internal review and appealed to the court against it pursuant to the provisions of s.40 of the *Freedom of Information Act* 1991 (SA).

The basis of the Director-General's refusal lay in the provisions of s.20(1) of the Act, which provides, in part, that 'An agency may refuse access to a document . . . if it is an exempt document'.

Although there is no provision in the Act which specifically provides that the documents listed in the First Schedule to the Act are exempt documents for the purposes of the Act, Judge Bowering decided that the only reasonable conclusion that could be reached on a proper construction of the Act is that those documents listed in the First Schedule are exempt documents for the purposes of the Act and that this view is confirmed by reference to provisions such as s.10(2).

With respect to some of the documents, more than one of the provisions of the First Schedule were called upon. Eleven of the documents were said to be exempt on the grounds that they constituted internal working documents, 16 on the basis that they constituted documents subject to legal professional privilege, two on the ground that they constituted documents relating to judicial functions and 11 on the basis that they constituted documents concerning operations of the agency.

Judge Bowering concluded that if the court is to properly discharge its function of review, it must call for the production of the documents, inspect them and then make its own decision as to whether they have been properly described and classified as exempt. He further concluded that the applicant has to trust the court to make a fair and just decision based on evidence some of which he or she may never see. Accordingly, he called for the documents to be produced and they were provided.

His Honour found that his opinion of how two of the documents should be described differed from that of the Department's officer, but that the differences were not substantial and that nothing turned on them in this case.

The Director-General had not only determined that access to the 22 documents should not be given to the applicant, but also that he should not be given access to any portion of any of those documents. Sub-section 20(4) of the Act requires an agency to give access to a document with the exempt portion excised if it appears to the agency that the applicant would wish to be given access to such a copy.

Public int rest

Paragraphs 9 and 16 of the First Schedule to the Act require a determination as to where the public interest lies regarding disclosure of the document. His Honour considered the cases of *Conway v Rimmer* (1968) AC 910 and *Sankey v Whitlam and Others* (1978) 142 CLR 1, but found that neither of these dealt with the concept of 'the public interest' as that term is used in the *Freedom of Information Act.*

He considered that the achievement of the objectives of the Act is conducive to the public interest and that it is a 'fairly weighty' factor to be taken into account when determining where the balance lies. The objectives are set out in s.3 of the Act.

Judge Bowering stated that in each case the documents must be viewed in the light of all relevant circumstances, their contents and purpose assessed and, that done, the question of balance decided. In considering this, His Honour found of assistance the propositions formulated by Davies J in the matter of *Howard and Treasurer of the Commonwealth* (1985) 3 AAR 169:

(1) The higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it is that the communication should not be disclosed.

(2) Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest.

(3) Disclosure which will inhibit frankness and candour in future predecisional communications is likely to be contrary to the public interest.

(4) Disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest.

(5) Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.

His Honour considered the various documents in the light of Paragraphs 9, 10, 11 and 16 of the First Schedule of the Act and the various authorities relating to the balance of the public interest. He came to the conclusion that the determination of the Director-General of Education was 'by and large correct', although he considered that some documents could be released with exempt material deleted and that some of those classified as exempt on the basis of paragraphs 9 and 16 were of such a nature that the provision of them to the applicant would not, on balance, be contrary to the public interest. He tentatively advised the parties that the applicant should not be granted access to 14 documents, that he should be granted partial access to

two documents and that full access should be granted to six documents.

Mr Stevens, Counsel for the Education Department, then referred to the provisions of s.42(2) of the Act:

> Where it appears that the determination subject to appeal has been made on grounds of public interest, and the Minister makes known to the Court his or her assessment of what the public interest requires in the circumstances of the case subject to the appeal, the Court must uphold that assessment unless satisfied that there are cogent reasons for not doing so.

Twelve of the 22 documents concerned were classified exempt under paragraphs 9 and 16, thus raising the question of the balance of public interest. Mr Stevens then informed the court that the Minister had instructed him and authorised him to advise the court that he had formed an assessment with respect to the 12 documents that it would be contrary to the public interest for them to be released.

Judge Bowering asked the applicant whether he knew of any cogent reason why the court should not uphold the Minister's assessment of what the public interest required in the circumstances of the case. Since the applicant was unaware of the purpose or content of the documents, he was unable to put forward such a reason. His Honour thought it reasonable in the circumstances to ask Mr Stevens, as an officer of the court and as one who had seen the documents, whether he knew of any such reason. Mr Stevens did not, nor did His Honour, although he suggested that, had any of the documents indicated a right of legal or other action for the applicant, that right would have constituted a cogent reason. Accordingly, he had no alternative but to find that the release of the documents would, on balance, be contrary to the public interest.

Conclusion

Consequently, Judge Bowering upheld the determination of the Director-General to classify the 22 documents as exempt documents.

His concluding comments were that in such cases involving the use of s.42(2) of the Act, he would expect the Minister's assessment to be made known to the applicant as soon as reasonably practicable after the institution of the appeal and well before the appeal comes on for hearing. He noted that the time at which the Minister's assessment is made known to the applicant could be a relevant matter in deciding an order on costs.

[A.H.]

"Info One"

Last year marked the 10th Anniversary of Australia's first FoI laws, as well as marking the passage of FoI in the last of the States.

Interested people from government, the legal profession and the community are invited to attend the 1st National FoI Conference 'Info One' to be held in Adelaide 22-24 September 1993.

Speakers include Peter Bayne on the public interest and personal privacy, Paul Chadwick on the media as a watchdog, Spencer Zifcak on the politics of FoI, Madeline Campbell in Extending FoI to the private sector, Michael Hogan on commercial in confidence.

A panel of Ombudsmen will discuss reviews and appeals and a series of subject and function workshops are being held in the main agency groupings and on such topics as privacy, public interest, the consultation process and archives.

This will be a great opportunity for you to meet your colleagues and discuss common issues.

Further information about the conference is available from Rebecca Horgan on (08) 267 8131. The Conference is being sponsored by the South Australian Government.