tain similar statements in the future; and

such an impairment would be 'so damaging to the public as to warrant non-disclosure of the document' (see *Ryder v Booth* [1985] VR 869 at 885 per King J).

The second document: public interest override

The Tribunal held that the second document should not be released pursuant to the public interest override in s.50(4) of the Act. It did so for two reasons.

First, the Tribunal distinguished *Re Beck and State Electricity Commission* (1985) 1 VAR 91, where it was held that, in appropriate cases, the public interest in protecting employment or property rights may outweigh the public interest in non-disclosure. In this case, the application did not concern the protection of such rights.

And second, the Tribunal distinguished *Re Richardson and Commissioner of Corporate Affairs* (1987) 2 VAR 51, where it was held that, if the agency intended to keep acting on the mistaken belief that information in a document was true, the public interest in clubs knowing that information may outweigh the public interest in non-disclosure. In this case, the Victoria Police did not intend taking any further action in relation to the second document. Moreover, there was nothing to suggest that the information in the statement was in fact false.

[J.D.P.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

Adapted with permission from Decision Summaries prepared by the Information Access Unit of the Family and Administrative Law Branch of the Commonwealth Attorney-General's Department.

MORRIS AND OTHERS and AUSTRALIAN FEDERAL POLICE (AFP)
(No. Q94/131)

Decided: 7 April 1995 by Deputy President S.A. Forgie.

Abstract

Section 4(1) — definition of 'personal information' — information 'about' a person — when identity can 'reasonably be ascertained from' information — use in conjunction with information available in public arena.

Section 11(1) and (2) — meaning of 'person' (1) — whether applicable to business names — reasons for making request not relevant to right of access (2) — may sometimes be relevant to application of exemptions.

- *Section 22(1) — edited copies of documents — deletion of exempt material — whether 'reasonably practicable' to make copy.*

  Sections 26A and 27A— adjournment for consultation with States where s.33A may apply and with relevant persons concerning personal information — interim deletion of information under Tribunal's general powers.
- *Section 33(1)(a)(iii) and (b) — damage to international relations (1)(a)(iii) — no evidence of damage — information communicated in confidence by foreign government or agency (1)(b) — information need not be confidential in character nor disclosure a breach of confidence — general understanding of confidentiality.*
- *Section 33A(b) and (5) — material communicated in confidence by State government or agency (1)(b) — evidence must be directed to specific information — public interest in ensuring that AFP continued to receive information — outweighed public interest in access (5).*
- *Section 37(1)(b) — no evidence person a confidential source of information.*
- *Section 40(1)(d) and (2) — meaning of 'substantial adverse effect' (1) — 'adverse effect of sufficient gravity, seriousness or significance to cause concern to a properly informed reasonable person' — law enforcement agency's need for confidential system of communications — disclosure would reveal sources of and responses to complaints — balancing public interest test (2).*
- *Section 41(1) — criteria for determining unreasonable disclosure of personal information — public interest considerations — unreasonable to disclose names and information appearing in context of police documents — whether can refer to person's interest in obtaining access.*

  Section 45(1) — elements of breach of confidence — information not having confidential quality and no evidence of being communicated or received in confidence.

Issues

Whether business names were entitled to seek access to information under the *FoI Act* (s.11(1)) or to obtain review under the *AAT Act* (s.27). Whether disclosure of Interpol and other police information exempt under s.33(1)(a)(iii), s.33(1)(b) or s.33A(1)(b)); scope of 'communicated in confidence'. Need for consultations under ss.26A and 27A. Meaning of 'substantial adverse effect' in s.40(1), and whether disclosure of information about police communications and sources exempt under s.40(1)(d). Whether identity could be 'reasonably ascertained from' information (s.4(1)) and whether personal information exempt under s.41(1). Whether information exempt under s.37(1)(b) or 45(1). Relevance of applicant's reasons for making a request (s.11(2)). Deletion of exempt or irrelevant information under s.22. Inadvertent disclosure under the Act of information later claimed to be exempt, and changes in grounds for decision.

Facts

Mr Morris, his wife and a number of corporations and business names sought access to documents which referred or related to their business practices and other matters. They were engaged in activities which included an internationally operating 'Mail Order Fulfilment House' which for a fee fulfilled subscriptions from

people wishing to purchase tickets in Australian lotteries, advised them of results, and helped obtain winnings. Morris said that he had been invited by the Government of the Northern Territory (NT) to apply for a licence to operate a Mail Order Fulfilment House, subject to a probity check by the NT Police, but that the NT Government had withdrawn from negotiations without warning. Some documents were refused in whole or in part. Further documents were discovered after the Tribunal's proceedings had commenced, and with the applicants' concurrence decisions under the Act were made in relation to those documents, most of which were wholly refused.

Decision

The Tribunal held that it had no jurisdiction to consider the review applications from the business names. It set aside the AFP's decision and substituted a detailed series of decisions in which some claimed exemptions were upheld, while in a large number of cases documents were ordered to be released with deletions. The proceedings were adjourned in relation to several documents to enable consultations to occur under ss.26A and 27A. In a Supplementary Decision on 28 April 1995 the Tribunal made amendments under 'the slip rule' to a small number of its individual decisions *(Morris No. 2,* this issue).

Business names not entitled to seek review

The business names were held not entitled to seek review of the AFP's decision. Section 11, dealing with access, and other sections used the words 'a person' which normally included 'a body politic or corporate as well as an individual' (*Acts Interpretation Act 1901* (AIA) (s.22(1)(a)). The objects clause (s.3), in referring to 'the right of the Australian community to access to information', did not justify a finding that a business name, which was not a natural person, a body politic or a body corporate, may make a request. A business name was not a separate legal entity although it was owned by a legal entity such as a natural person or a body corporate. Similarly, the business names could not make an application to the Tribunal for review: s.27 of the *AAT Act* provided only that an application may be made by a person or persons, including the Commonwealth or a Commonwealth authority, whose interests are affected by a relevant decision, and did not extend the right to make an application to a business name. The decision on this matter had no effect on the rights of the remaining six applicants.

Inadvertent release of information and change of grounds for decision

One folio of a document had been inadvertently released by the AFP in the mistaken belief that it was part of another document. The Tribunal declined to review the decision to grant access to it under the Act. It also stated that there was nothing to prevent a decision maker from changing or refining the reasons for reaching a particular decision; that occurred frequently as part of the internal review process and in the course of the conference or other alternative dispute resolution procedures and directions hearings of the Tribunal. However, it was important that an applicant be given fair warning of the shift in reasons for a decision so that the applicant had an appropriate opportunity to prepare a response.

Section 33(1)(a)(iii) — damage to international relations — ss.33(1)(b) and 33A(1)(b) — information communicated in confidence by another government or agency

The Tribunal rejected several claims under s.33(1)(a)(iii). There was no evidence that disclosure of the information could in any way be reasonably expected to cause damage to Australia's international relations (referring to *Re Maher and Attorney-General's Department* (1985) 7 ALD 731 at 742 per Davies J).

The Tribunal stated that s.33(1)(b) (and by implication s.33A(1)(b)) required only that the relevant information has been communicated in confidence by or on behalf of the bodies referred to in the section. It was not necessary to consider whether the information is capable of being confidential or its disclosure would be a breach of confidence (as in s.45), or would cause damage to matters concerning the Commonwealth (as in s.33(1)(a)) (*Commonwealth v Hittich* (1994) 53 FCR 152; (1996 61 *Fol Review* 10). (See Comment in para. 2 below.) The Tribunal found that there was a general understanding between Australia and other member countries of Interpol to maintain the confidentiality of 'Interpol documents' (and see Davies J in *Re Maher,* above, at 737)), and on that basis was satisfied that certain documents were sent in confidence. Extracts from those documents were also exempt. One document was found to have been communicated in confidence by an authority of a State to an authority of the Commonwealth (s.33A(1)(b)). The Tribunal weighed the public interest in ensuring that the AFP continues to receive the information it requires in order to carry out its operations effectively, against the public interest in the public's knowing the information held in public records and in an individual's knowing what is said about that individual (s.33A(5)). The former outweighed the latter and the document was held exempt.

In the case of some other documents it could not be concluded that any of the information had been given in confidence. It was 'not enough to assert generally that information was obtained as a result of confidential enquiries . . . [t]he evidence must be directed to the specific information for which exemption is sought'. However, one State might wish to contend that some other information was exempt under s.33A: it was therefore necessary to adjourn further consideration of the information to enable consultations to occur under s.26A. (See Comment in para. 5 below.) As a practical matter, the Tribunal directed that this information be deleted from the document before it was released, relying not on s.22 of the *Fol Act* but on s.33 of the *AAT Act* relating to the AAT's powers concerning procedure.

Section 40(1)(d) — substantial adverse effect on operations of agency

The Tribunal found in relation to most of the documents that the 'format' of some of the information revealed certain procedures and processes employed by the AFP as well as various sources from which the AFP obtained information and steps taken on receipt of information, and that disclosure would have a substantial adverse effect on the operations of the AFP (s.40(1)(d)). A law enforcement agency required systems of communication to carry out its functions, and if they became generally known it would have an effect on the AFP's operations, for instance by permitting unauthorised access to its means of communication, requiring review to ensure their continuing security. That result 'could reasonably be expected to have an adverse effect of sufficient gravity, seriousness or significance to cause concern to a properly informed reasonable person' (see next para.). The Tribunal ordered that many documents be re-

leased after deletion of s.40(1)(d) material (s.22). In one case the Tribunal said it was not 'reasonably practicable' to make a copy from which the exempt material had been deleted so that the copy was not exempt, because the small amount of non-exempt information was intertwined with the exempt information. (However, see Comment in *Morris (No. 2)*, this issue.)

The Tribunal examined the differing views which variously constituted Tribunals had expressed as to the meaning of 'substantial adverse effect' in s.40(1)(d). These were:

(i) an indication of the degree of gravity which must exist before the exemption could be made out (commencing with *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 at 564), and followed by the Tribunal in many cases);

(ii) indicating an effect that is 'real or of substance and not insubstantial or nominal' (Muirhead J in *Ascic v AFP* (1986) 11 ALN N184; (1986) 6 *FoI Review* 84); and

(iii) 'substantial adverse effect' connotes an adverse effect which is sufficiently serious or significant to cause concern to a properly informed reasonable person' (*Re Thies and Department of Aviation* (1986) 9 ALD 454 at 463, Deputy President Thompson presiding).

Without determining whether the difference between (i) and (ii) was real rather than illusory, the Tribunal adopted the approach in (iii) (see Comment in para. 3). The Tribunal also examined the judgments in *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97; (1986) 3 *FoI Review* 35) concerning the meaning of the expression 'could reasonably be expected to' (and note comment on this in *Searle Australia Pty Ltd v PIAC and DCSH* (1992) 108 ALR 163).

Sections 4(1) and 41(1) — unreasonable disclosure of personal information — s.27A — consultation with third parties

The Tribunal found that names that might have been business names, or names of unincorporated associations, or incorrectly written names of companies, were not 'personal information' as defined in s.4(1) and employed in s.41(1). In the application of s.41(1) the threshold question was whether the information was about an individual person. In the case of these names it was necessary to enquire 'whether it would be possible to use the information in conjunction with information already available in the public arena'. This was similar to 'the mosaic effect' in other exemptions (e.g. ss.43(1)(c)(i) and 37: see *Re Actors' Equity Association of Australia and Australian Broadcasting Tribunal (No. 2)* (1985) 7 ALD 584). Here, however, there was no evidence of what was available in the public arena and the identity of any individuals behind the business names could not be reasonably ascertained. Information which might otherwise have been about an individual thus did not come within s.41(1). (See Comment in para. 4 below.)

The Tribunal held that disclosure of certain names appearing in police documents would be unreasonable. The nature and context of information about individuals appearing in AFP files and information reports, whatever its current relevance, made it unlikely that the persons concerned would wish it to be released without their consent. Disclosure of some other names and other personal information did not appear to be unreasonable: it was publicly available. Nonetheless, the Tribunal considered it was obliged to adjourn the matter to allow consultations to occur under s.27A. (See Comment in para. 5 below.)

There was no change to the meaning of the word 'unreasonable' in s.41(1) as a result of the amendment made in October 1991 (*Re Zalcberg and AOTC*, unreported, 12 June 1992). '[W]hether or not disclosure would be unreasonable is a question of fact and degree which calls for a balancing of all the legitimate interests involved' (Full Federal Court, *Wiseman v Commonwealth*, unreported, 24 October 1989; (1990) 25 *FoI Review* 9). Similarly, in *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257 at N259, Deputy President Hall referred to the need to consider all the circumstances including 'the public interest recognized by the Act in the disclosure of information in documentary form in the possession of an agency' which must be weighed 'against the public interest in protecting the personal privacy of a third party whose personal affairs may be unreasonably disclosed by granting access to the document'. What is 'unreasonable' disclosure of information for purposes of s.41(1) must have at its core, public interest considerations' (Lockhart J in *Colakovski v ATC* (1991) 13 AAR 261 at 270; (1991) 33 *FoI Review* 32). Jenkinson J's view in that case (at 272), that there was no provision in the *FoI Act*, apart from s.91(2), which qualified the recipient's freedom to disseminate throughout the community information obtained under the Act, precluded reference being made 'to a person's interest in obtaining access under the Act', and this was reinforced by the insertion in 1991 of s.11(2) (but see Comment in para. 1 below.)

Section 45 — breach of confidence

The Tribunal followed the views on breach of confidence expressed by Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs* (1987) 13 ALD 254; (1987) 12 *FoI Review* 72 and adopted in *Re Kamminga and ANU* (1992) 15 AAR 297; (1992) 40 *FoI Review* 48. In this case the information, an enquiry from an AFP officer stationed overseas, had been specifically identified, but there was no indication that it had the necessary quality of confidentiality; it might even have been common or public knowledge. There was also no evidence to establish that the information had been communicated to or received by the AFP in confidence: the fact that it had been passed on with certain restrictions was not determinative.

Section 37(1)(b) — confidential source of information

The Tribunal rejected a claim for exemption under s.37(1)(b) as there was no evidence that the person or persons of whom enquiries were made were confidential sources of information.

Comments

1. At one point the Tribunal stated that, after the threshold question of whether a document comes within a request, an association between an applicant and the information sought may become relevant in limited circumstances, for example in considering whether disclosure of personal information would be unreasonable under s.41(1). Later it said that it was precluded from making reference to a person's interest in obtaining access in making a decision under s.41(1), partly as a result of s.11(2). There appears to be some contradiction between these two statements. In general terms it is correct that an applicant's reasons for making a request, including what the applicant intends to do with the information if successful, are not relevant to decisions concerning the application of

exemptions (see *Re Green and AOTC* (1992) 28 ALD 655; (1994) 50 *FoI Review* 21), partly because disclosure under the *FoI Act* is in effect not limited to the applicant (as Jenkinson J commented in *Colakovski* (above)). However, it may still be open to decision makers to take account of any public interest in the particular applicant obtaining access to the information, for example because of the fact that the information relates to the applicant (see e.g. ss.41(2) and 43(2), *Re James and ANU* (1984) 6 ALD 687, and Comment in para. 2 of *Re Gold and AFP and NCA*, (1996) 62 *FoI Review* 19).

2. In *Re the Environment Centre (NT) and Department of Environment, Sport and Territories* (1994) 35 ALD 765; (1995) 59 *FoI Review* 82 the same Tribunal said that whether information communicated by another government or agency was confidential in character at that time or had been communicated in circumstances giving rise to an obligation of confidence, while not essential to a finding that information had been communicated in confidence under s.33(1)(b) or s.33A(1)(b), was nonetheless relevant in determining whether that had occurred. While not repeated by the Tribunal in this case, the approach in *The NT Environment Centre* case appears helpful in applying the exemption.

3. In *Re Russell Island Development Association* (1994) 33 ALD 683; (1994) 54 *FoI Review* 88 the same Tribunal had adopted the view on the meaning of the word 'substantial' in s.40(1)(d) expressed in *Ascic v AFP* (above). In the present case the Tribunal preferred the view expressed in *Re Thies* (above), while differently constituted Tribunals continue to adopt the view first expressed in *Harris v ABC* (above) (see e.g. *Re Stewart and Telstra Corporation*, unreported, 15 April 1994; (1995) 56 *FoI Review* 26, a decision of the ACT Tribunal in *Re 'B' and ACT Medical Board of Health* (1995) *55 FoI Review* 10, and *Re Saxon and AMSA*, unreported, 26 June 1995; in *Re Wallace and MPRA*, unreported, 13 July 1995 the Tribunal arrived at the *Harris* view by another route). While in the present case the Tribunal left undecided whether there was a real difference between the views expressed in *Harris* and *Ascic*, there is no doubt that Muirhead J in *Ascic* believed there was. The formulation in *Re Thies*, that "substantial adverse effect' connotes an adverse effect which is sufficiently serious or significant to cause concern to a properly informed reasonable person' may perhaps be seen as a variant on the view expressed in *Harris* that a degree of gravity must exist, and may therefore enable the Tribunal to reconcile the views in *Harris* and *Thies* to the exclusion of that in *Ascic*. The final outcome of these differing lines of authority remains to be seen.

4. There has been little authority so far on how to determine when identity 'can reasonably be ascertained from (information)' (s.4(1) definition of 'personal information'). The Tribunal's comments are useful in establishing that the question is whether the relevant information can be 'used in conjunction with information already available in the public arena' in a similar way to the use of the 'mosaic effect' in other exemptions (see also *Re Gold and AFP and NCA* (above) and *Re Sime and Department of Immigration and Ethnic Affairs*, unreported, 3 May 1995). However, the limits of what can 'reasonably be ascertained' remain to be explored in detail in future cases. Does it mean, for example, that the only information in the public arena which is relevant is what would be known by a hypothetical reasonable person, or does it rather mean information which would be readily known to those persons with close knowledge of the person(s) or circumstances concerned? The latter would provide greater privacy protection but might be more uncertain in its application.

5. On the desirability of agencies avoiding the need for the Tribunal to adjourn matters while consultations are conducted under ss.26A, 27 and 27A, see Comment in *Re Harts and Tax Agents Board (Queensland)* (1995) 60 *FoI Review* 102.

MORRIS AND ORS and AUSTRALIAN FEDERAL POLICE (AFP) (NO. 2) (No. Q94/131)

Decided: 28 April 1995 by Deputy President S.A. Forgie.

Abstract

- *Application of the 'slip rule' to Tribunal's principal decision.*

  Section 22(1) — edited documents — removal of reference to edited document being 'misleading' — not permissible to delete further information so that edited copy makes better sense.

Issu s

Application of the 'slip rule' concerning minor corrections to decisions of the Tribunal. Removal of reference to edited document being 'misleading' (s.22(1)).

Facts

The Tribunal gave its principal decision in this matter on 7 April 1995, although decisions on several documents were adjourned to enable consultations to take place: *Re Morris and AFP* (this issue). The AFP's counsel asked that certain aspects of the decision be corrected under the 'slip rule'. Both parties submitted that the Tribunal had power to correct errors in certain situations.

Decision

Application of the 'slip rule' in Tribunal proceedings

In view of the agreement of the parties to that course (although this was not determinative of jurisdiction), the weight of reasons in the authorities and the good sense of taking that course of action, the Tribunal accepted that it had power in this case to correct certain minor errors in its earlier decision. However, it reserved the right to reconsider the general issue in an appropriate future case. There were strong authorities to the effect that the Tribunal had power to correct accidental errors in drawing up its decisions, for example errors of calculation, typing errors, errors of punctuation or of setting out, giving rise to unintended changes of meaning; however, the power did not extend to correcting a conscious and deliberate decision in respect of a matter or an inconsistency between the reasoning and decision-making process in one area and that in another (*Re Dillon and Department of Trade & ors (No. 2)* (1986) 9 ALD 187 at 189 per Deputy President Todd; (1986) 5 *FoI Review* 66). In *Re Pontin and Repatriation Commission* (1991) 22 ALD 191 the Tribunal corrected an order, dismissing an application, that was based on a mistake of fact and therefore did not properly express its intention. However, in the present case the Tribunal had some doubts about the conclusion that the power existed in view of the fact that s.42A(10) of the *AAT Act*, inserted in 1993, conferred specific power on the Tribunal to reinstate an application that had been dismissed in error. If the provision was intended to clarify an existing power, the Tribunal asked

why the whole issue of power to correct error had not been dealt with. The Tribunal considered that the purported clarification of powers that already exist may lead to their obfuscation.

The Tribunal amended its decision and/or reasons in the following circumstances: failure to transfer a conclusion in the reasons to the formal decision; where the Tribunal had mistakenly overlooked material of the same kind as it had held exempt elsewhere; where the wrong folio had been identified. However, it was not appropriate to reconsider a matter where the Tribunal had not turned its attention to the application of a second exemption to specific information for which an exemption had been established. In another case, while others might consider the Tribunal to have been incorrect in its judgment that certain information was not exempt while other information was, the slip rule did not apply to a situation where the Tribunal had intended to make the decision it did. The Tribunal had determined that there was insufficient evidence in relation to some information to establish that disclosure could reasonably be expected to have a substantial adverse effect on the operations of the AFP (s.40(1)(d)).

Section 22(1) — whether edited copy 'misleading' not relevant

The Tribunal rejected a request by the AFP for deletion of additional words from a document under s.22(1)(b)(i) in order to give sense to the remaining portions of the document. Section 22(1) had originally required consideration to be given to whether the copy from which deletions had been made would be misleading. The reference to the copy's being misleading had been removed in an amendment made in October 1991, and there was no other relevant provision in the *FoI Act*. It was therefore not permissible to take account of whether the remaining words would make better sense if additional words were also deleted.

Comments

1. The Tribunal's conclusion on the removal of the reference in s.22 to whether an edited copy of a document is 'misleading' or not would seem to have implications for the decision of the Tribunal in the principal case that only a small amount of non-exempt material would remain once intertwined exempt material was removed and that therefore it was not 'reasonably practicable' to make the deletions (see *Morris and AFP (No. 1)*, this issue). The fact that the material remaining after deletion may be meaningless or of little use is no longer relevant and is not a proper matter for the application of the 'reasonably practicable' exception. That exception relates rather to physical problems or workload considerations: see New FoI Memo No. 19, paras 7.14-7.16. It is nonetheless sensible for agencies to consult with an applicant concerning his or her wishes where little or no useful information would remain after deletions, in order to save the applicant unnecessary charges for unwanted material and to avoid possible criticisms.

2. The Tribunal in *Re Dillon (No. 2)* (above) also had some doubts that s.33 of the *AAT Act,* which applies only to 'proceedings before the Tribunal', was a sufficient basis for the application of the 'slip rule'. The absence of such a power would certainly be very inconvenient, as the present case demonstrates. In *Dillon* the Tribunal refused to apply the slip rule, even if it had been available to it, to a situation where information had been specifically held not exempt after consideration by the Tribunal although closely similar information had been held exempt. There were 'inconsistencies in the reasoning and decision-making in one area when compared to another', but that was not a proper circumstance for the application of the 'slip rule'. What the Tribunal refused to do in *Dillon* is very similar to the Tribunal's decisions in this case to exempt material which it had mistakenly overlooked was similar to other material held exempt. However, in *Dillon* the Tribunal had actually turned its mind to whether the specific material was exempt or not, whereas in this case the Tribunal had failed to advert to whether or not the material was exempt. The distinction is a fine one and illustrates the difficulties involved in amending decisions of Tribunals or Courts. The central considerations are whether orders correctly express the intentions of the Tribunal and that the 're-opening of the Tribunal's reasoning' must be avoided (*Dillon*). See also *Re Saxon and AMSA*, unreported, 19 & 26 June 1995 for application of the 'slip' rule to make amendments to spelling and an error in identification of documents.

STAATS and DEPARTMENT OF THE PRIME MINISTER AND CABINET (DPM&C) (No. V94/991)

Decided: 3 April 1995 by Deputy President G.L. McDonald.

Abstract

- *AAT Act, section 29(7) — discretion to extend time to apply for review — Tribunal must consider interests of applicant, whether any prejudice to the respondent, and the ends of justice — onus on applicant not discharged.*
- *Section 30A (FoI Act) — remission of application fee.*

Issues

Whether the applicant had satisfied the Tribunal that it should exercise its discretion to grant an extension of time under s.29(7) of the *AAT Act* to make an application to it for review of a refusal to remit an FoI application fee *(FoI Act,* s.30A).

Facts

Mr Staats sought an extension of time in which to lodge an application with the Tribunal for review of a decision by DPM&C not to remit an application fee of $30 *(AAT Act,* s.29(7) and *FoI Act,* ss.30A and 55(4)(a)). Although at the conclusion of proceedings in the Tribunal Staats sought an injunction in the Federal Court restraining the Tribunal from proceeding with the application, the Federal Court proceedings had already been adjourned.

Staats had sought FoI access to all documents in a DPM&C file relating to the book *The Prime Minister was a Spy*. He requested remission of the $30 application fee under s.30A, on the basis that he was 'a social security recipient without any other income and no property or assets' and had debts exceeding $5000. DPM&C refused the request for remission on the grounds that:

(i) s.30A contained a discretion to remit a fee on the ground of financial hardship or on the ground that the giving of access would be in the public interest, and

(ii) dealing with his previous requests, for which fees and charges had been remitted, had expended a considerable amount of departmental resources which should not be channelled so narrowly.

On internal review Staats also advanced public interest grounds for remission of fees and charges. DPM&C remitted the $40 fee for internal re-

view but affirmed the earlier decision on the grounds that:

(i) while Staats' financial circumstances were not good they would not be significantly adversely affected by payment of the $30 application fee, and

(ii) there was no public interest in disclosing the material which would warrant remission of the fee. DPM&C also advised Staats of a likely processing charge of $400 if the application proceeded.

The Tribunal calculated that the period for the applicant to apply to the Tribunal without requiring an extension of time expired on 22 August 1993. The extension sought was from that date until 27 October 1994, the date when the Tribunal received his application, a period of some 14 months. In support of his request for extension of time Staats referred to his 'serious poverty and disadvantage existing solely on unemployment benefits' and claimed the refusal of remission was an attempt to deny him access to non-sensitive information.

Decision

Section 29(7) of AAT Act — extension of time to make application

The Tribunal determined that the substantive application was for review of the refusal to remit the application fee of $30 (s.15(2) and reg. 5(a)). The decision of DPM&C related only to that question, and, despite references to charges that might be levied if the application proceeded, there was no decision under s.29(4) of the *FoI Act* concerning the imposition of charges.

The Tribunal declined to grant an extension of time under s.29(7). It was for the applicant to satisfy the Tribunal that the time should be extended. The Tribunal had to determine whether there would be any prejudice to the respondent if an extension was granted, and to take into account broader considerations of justice and not only the interests of the applicant (*Lucic v Nolan* (1982) 45 ALR 411 at 415).

In his oral evidence Staats referred to a complex chain of events at the time of the relevant decision which he claimed had affected his ability to take the matter further at that time. He referred to alleged pressures placed on him to prevent him obtaining documents. The Tribunal described the assertions made by Staats in support of his application as 'so bizarre' as to make it unable to accord any weight to them. It was not satisfied that the onus of proof had been discharged. The Tribunal was not satisfied that the ends of justice would be met by granting an extension.

Comment

The Tribunal's decision concerned only the question whether an extension of time should be granted and did not address the substantive question of the remission decision. However, for exercise of the discretions in ss.29(4) and (5) and 30A, see New FoI Memo No. 29, paras 76-100.

[R.F./R.A.]

Recent Developments

TELSTRA AND FoI

Ombud man Report of an investigation into a complaint by Mrs Ann Garms

This is a report into an investigation of a complaint about Telstra's handling of an application made under the *Freedom of Information Act 1982 (FoI Act).* The complainant, Mrs Garms, is a member of COT (Casualties of Telecom) Cases Australia, a group of people who are in dispute with Telstra concerning Telstra's handling of claims for financial compensation for losses attributed to alleged defects in the telephone services provided by Telstra.

Mrs Garms had made almost 50 complaints about Telstra's handling of her FoI applications. The Ombudsman in 1994 had reported on her investigation into complaints by another COT member, Mr Graham Schorer. The Ombudsman is still investigating FoI complaints by two other COT members. Telstra was faced with the task of processing COT applications dealing with almost 200,000 documents.

Whilst acknowledging that some of the problems could be attributed to a shortage of staff trained in handling FoI applications, non-compliance with procedures, and an absence of a strategy for dealing with FoI applications such as that from the COT members, the Ombudsman reached the following conclusions:

- Telstra's handling of Mrs Garms's FoI applications was defective;
- there were unnecessary delays in providing documents outside the *FoI Act*;
- there were unnecessary delays in providing documents under the *FoI Act*;
- Telstra was, in the Ombudsman's opinion, wrong to direct that the solicitors should identify whether exemptions had been applied wherever possible under the *FoI Act* (paras 3.102-3.123); and
- Telstra's record keeping practices are inadequate, at least insofar as they relate to maintenance of records on matters which are the subject of dispute with customers (paras 3.125-3.127).

The Ombudsman considered that 'In, my opinion, Telstra's approach to Mrs Garms's FoI applications remains orientated to avoiding disclosure of information'.

This Report is compulsory reading for anyone with an interest in FoI in Australia.

[R.S.]