

# NSW FoI DECISIONS

## District Court

### SIMOS v WILKINS NSW District Court (No. 187/1996)

**Decided:** 15 May 1996 by Cooper DCJ.

#### Abstract

*Clause 1(1)(a), Schedule 1, FoI Act 1989 (NSW) — document that has been prepared for Cabinet is exempt — no sole purpose test to apply — content not an issue but purpose.*

*Clause 1(2)(a), Schedule 1 — document consisting of merely*

*factual or statistical material not exempt — document in question contained opinion and gave advice.*

- *Clause 1(1)(a), Schedule 1 — meaning of Cabinet — no discussion of what constitutes Cabinet.*
- *Implied waiver of right to claim exemption — conduct of government concerning document in Parliament — no such right in Act.*
- *Section 28(2)(e) — reasons for decision to refuse access — information sources supporting finding*

*of fact to be specified — consequence of non-compliance — no effect on exemption only on order for costs.*

- *Statutory Interpretation — Act to be interpreted according to its own terms — no basis for interpreting it on basis of decisions involving public interest immunity.*

This decision is summarised and discussed on p.20 of this issue.

[P.W.]

# 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.

### KIRKWOOD v SECRETARY, DEPARTMENT OF HUMAN SERVICES AND HEALTH (DHS&H) (No. G136 of 1995)

**Decided:** 12 December 1995 by M.J. Beazley J.

#### Abstract

- *Section 15(5) and (6) — time limits for processing FoI requests — failure to meet time limits is a relevant consideration in considering delay in relation to costs application under s.66 — not determinative as all circumstances need to be taken into account.*

*Section 56(1) — deemed refusal where decision on request deferred until outcome of a previous request determined.*

*Section 66(1) and (2) — whether payment of costs or part of costs would cause financial hardship to applicant (2)(a) — difference between uncontroverted evidence and sufficiency of evidence —*

*matter for Tribunal to determine whether satisfied on evidence that financial hardship made out — Tribunal in error in decision on reasonableness of delay (s.66(1), general discretion) — Tribunal in error in holding that FoI request was 'unnecessary' — applicant entitled to consideration of request on merits — applicant's offer to settle costs claim not relevant to recommendation for costs.*

#### Issues

Whether the Tribunal had erred in law in rejecting an application for recommendation as to costs (s.66). Meaning of error of law for unreasonableness ('Wednesbury unreasonable'). Role of Tribunal in determining whether financial hardship established (s.66(2)(a)). Whether delay of respondent unreasonable or not (s.66(1), general discretion). Whether applicant's FoI request was 'unnecessary' in view of an earlier request and the right of an applicant to have request processed on its merits. Relevance to costs recommendation under s.66 of a previous offer by applicant to settle costs matter.

#### Facts

A full statement of the facts up to the Tribunal hearing may be found in *Re*

*Kirkwood and Department of Health, Housing and Community Services (DHH&CS)*, unreported, 6 February 1995; (1996) 62 *FoI Review* 21. In brief, Mrs Kirkwood, through her solicitors Cashman & Partners, sought access to documents concerning (i) the fracture of a heart valve implanted in her late husband, and (ii) any other reported or suspected fractures of Bjork Shiley Convexo Concave heart valves. DHH&CS took the view that all the documents were already encompassed in an earlier request from Cashman & Partners which had not been finalised because of consultations that were taking place with the owner and distributor of the valves (see *Re Cashman & Partners and DHH&CS* (1994) 33 ALD 627 and *Cashman & Partners v Secretary, DHS&H*, unreported, 12 December 1995; p.31 this issue of *FoI Review*). DHH&CS accordingly deferred dealing with Mrs Kirkwood's request until it had reached a decision on the Cashman & Partners request.

As a result of the failure to make a decision on Mrs Kirkwood's request there was a deemed refusal in relation to that request (s.56(1)). At the hearing of the appeal in the Tribunal in the Cashman matter the solicitors made a review application in relation