NSW

The most significant aspect of the NSW Ombudsman's report is her account of a second audit of compliance by 132 government agencies with annual reporting requirements under the FoI Act for the year 1996–97. The words of the report speak for themselves:

> From our audit it appears that:
>
> our estimate of the overall number of FoI applications made to NSW agencies in 1996–97 decreased by about 6% from the previous year, primarily because area health services have adopted 'open access' policies;
>
> while the number of applications resulting in full or partial release of documents decreased slightly from the previous year, the number of applications resulting in access being completely refused remained largely the same;
>
> little use was again made of the right to seek the amendment of records where they are considered to be incomplete, incorrect, out of date or misleading;
>
> the Act does not have significant resource implications for most agencies;
>
> there has been a continuing poor level of compliance with FoI annual reporting, although there has been some improvement over the previous years;
>
> there has been a serious failure by a significant number of government agencies to comply with the summary of affairs requirement of the Act (for example at least 68 agencies failed to publish a summary of affairs in the June reporting period and a least 29 agencies have failed to do so in the last four reporting periods);
>
> a review of summaries of affairs published by NSW Government agencies in the last two reporting periods indicates a significant, widespread and increasing failure to comply with the requirements of the Act; and
>
> a review of the summaries published by local councils in the last two reporting periods indicates that the improvement achieved in the June '97 reporting period has largely been maintained, although there is an increasing number of councils failing to comply. [p.175]

Each of these findings is deserving of more detailed examination.

Queensland

For our purposes the comments above under responses to recommendations apply here as well, but one other issue is notable. The Information Commissioner's report notes the commendable efforts made to reduce the number of applications outstanding for review. He observes that part of the reason for the backlog was the under-resourcing of his Office in its first few years (p.2) and the message from this surely is that FoI matters must be dealt with quickly and any review process can only truly advance the interests of FoI users and attain the objectives of the legislation if it too is properly resourced.

Conclusions

The three Annual Reports provide fertile grounds for more public interest research especially in relation to such issues as the relation between Parliamentary processes and the content of annual reports, the fate of recommendations made in reports, and FoI practices as well as doctrinal analysis of the specific provisions of legislation as revealed by the case studies contained in such reports.

[P.W.]

The High Court on the place of FoI

On 19 November 1998 the high Court gave its decision in the case of *Egan v Willis*.

The decision will be discussed in the next issue of the Review. It concerns the power of the NSW Legislative Council to demand documents from the Executive Government, through a Minister in the Council.

The High Court (six judges unanimously) held the Council did have the power to demand the tabling of documents. The real issue in the case now remains what the Council can do when its request for documents is refused by the Executive.

Of interest for this note is a comment about our system of responsible government. In their joint decision Gaudron, Gummow and Hayne JJ emphasised the role of Parliament in bringing the Executive Government to account. They added:

> In Australia, s.75 of the Constitution and judicial review of administrative action under federal and State law **together with freedom of information legislation**, supplement the operation of responsible government in this respect. [para. 42 of decision — emphasis added]

At the time of writing, the NSW Government was still refusing to table the documents originally requested by the Legislative Council, originally requested in 1996.

VICTORIAN FoI DECISIONS

Administrative Appeals Tribunal

HOLBROOK and DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT
(Nos. 1997/10703 and 1997/77326)

D cided: 16 December 1997 by Deputy President Macnamara.

Section 34 (business affairs) — Section 50(4) (public interest override).

Factual background

Some time in 1989, the Penguin Reserve Committee of Management commenced formulating proposals for the redevelopment of the Point Grant Nobbies area. In May 1994, Seal Rocks Victoria Australia Pty Ltd (Seal Rocks) advanced their own proposal. The Victorian Government later called for expressions of interest from parties seeking the right to redevelop the Nobbies area, to which Seal Rocks responded. The Government eventually approved Seal Rocks' plan.

Seal Rocks' proposal involved a two-stage development process. The terms upon which Stage One was to be carried out were embodied in a preliminary agreement made on 19 August 1996 (the Heads of Agreement) between the Minister for Conservation and Land Management and Seal Rocks. The Heads of Agreement provided for a number of other agreements to be entered into or executed (the preliminary

agreements). Final versions of these documents were executed on 27 March 1997 (the 1997 Agreements).

Procedural history

On 13 November 1996, Holbrook, Secretary of the Nobbies Action Group (a group opposed to Seal Rocks' proposal), requested the release of information regarding the Heads of Agreement. Access was denied. That decision was confirmed on 2 January 1997 after an internal review. On 18 February 1997, Holbrook filed an application for a review of that decision.

On 5 June 1997, NAG Incorporated sought access to the 1997 Agreements. This request was denied. That decision was affirmed on 16 October 1997 after an internal review. On 5 November 1997, NAG Incorporated filed an application for a review of that decision.

On 20 November 1997, the Tribunal ordered that both review proceedings be heard concurrently and that Seal Rocks be joined as a party.

By the conclusion of the hearing, the majority of the text of the documents in dispute (the Heads of Agreement, the preliminary agreements and the 1997 Agreements (together, the Documents)) had been released. Seal Rocks remained opposed to the release of certain portions of the Documents on the basis that they disclosed sensitive financial information. The respondent Department also continued to oppose the disclosure of portions of the Documents on the basis that they represented specially negotiated terms of the arrangements, the release of which would prejudice it and other agencies in future negotiations of similar agreements.

The decision

The Tribunal ordered the Department to grant partial access to the Documents.

The reasons for the decision

Section 34(1)

After reviewing a number of conflicting decisions concerned with the scope of s.34(1), the Tribunal rejected the general proposition that a document disclosing the amount payable by the Government in relation to a transaction constituted a mere record of the transaction and, therefore, could never constitute information 'acquired' by an agency from a business undertaking that was exempt under s.34(1). The Tribunal noted in this respect that the price payable may 'reveal the price at which the business undertaking is prepared to do business'. By contrast, an amount representing an ex post facto compromise may not meet the requirements of the exemption. Similarly, the amount may not be exempt if it is 'small or inconsiderable' or 'so incidental and remote from the central operations of the business undertaking'.

The Tribunal further noted that, to qualify for the exemption, a respondent need only show that disclosure of the text would *reveal* information acquired by a government agency from a business undertaking, not that that the information actually *was* information acquired by a government agency from a business undertaking.

After reviewing the evidence presented, the Tribunal upheld Seal Rocks' claim for an exemption under s.34(1). The Tribunal found that the relevant information (namely, revenue projections and the quantum of one of Seal Rocks' major continuing outlays) satisfied the test laid down in *Accident Compensation Commission v Croom* [1991] 2 VR 322 at 330; (1991) 35 *Fol Review* 52, namely that:

> where information relates to some matter of business, in order to claim the exemption it would be necessary to show that the information impinged in some way upon the actual conduct or operations of the undertaking itself [and that the information] could be regarded as a sensitive kind from the perspective of the undertaking.

Section 34(4)

The Tribunal noted at the outset that the exemption in s.34(4) applied only in the case of an agency engaged in trade or commerce. In this context, the Tribunal accepted that although the trading operations of an agency may be incidental to the relevant agency's major operations, the agency's operations might still be found to be 'engaged in trade or commerce' for the purposes of s.34(4). In the instant case, the Tribunal held that the fact that the Department had been engaged in negotiating a number of concession agreements (in addition to its involvement in the tender process and negotiations) was sufficient to show that the Department was engaged in trade or commerce, despite the fact that the Department's major operation was as a department of government.

The Tribunal also noted that the disadvantage that would have to be shown would be to the respondent agency, and not to any other department of state.

The Tribunal found that the evidence did not establish the likelihood of disadvantage to the Department flowing from the release of the Documents, other than those containing financial information. In making this finding, the Tribunal noted that, in practice, a limited number of players from both the private and public sectors were generally involved in negotiations such that 'knowledge of Government negotiating strategies will have been fairly widely dispersed among major consultant players who are likely to be involved in future projects'. Notably, the Tribunal was fortified in its conclusions by the fact that a number of the final documents already released by the Department or available publicly contained provisions similar to the ones for which exemption was sought.

The Tribunal further held that the preliminary agreements ought also to be released, subject to the exemptions upheld in relation to the 1997 Agreements. The Tribunal affirmed that where a draft document — draft being used in the sense that the document had no status because it had yet to be adopted as a final commitment by any party — was not part of the deliberative process, there existed no presumption that it ought not to be released. In the instant case, the draft documents were prepared in association with the Heads of Agreement and did possess some contractual standing. They did not form part of the deliberative process and, therefore, were not exempt.

Section 50(4)

The applicant contended that the public interest in ensuring that the terms on which Crown land was made available to private developers for a profit were fair and reasonable required disclosure of the Documents in the public interest. The Tribunal noted, however, that the site had been leased to Seal Rocks at the rental assessed by the Valuer General. Moreover, no evidence was advanced to show that there was any particular public controversy or concern as to the quantum of consideration payable by Seal Rocks. In the circumstances, the Tribunal

concluded that the public interest override should not be invoked.

[C.P.R.]

GARBUTT and VICTORIAN PLANTATIONS CORPORATION (No. 97/050174)

D cided: 20 March 1998 by Presiding Member Coghlan.

Section 5 (definition of 'prescribed authority').

Factual background

The respondent, the Victorian Plantations Corporation (the VPC), was established in 1993 to take over the commercial timber operations of what is now known as the Department of Natural Resources and Environment (the Department).

Procedural history

On 7 May 1997, Garbutt wrote to the Department requesting access to all documents concerning any proposals to privatise or contract out the VPC. On 10 July 1997, the Department advised Ms Garbutt that all files relating to the VPC had been transferred to the VPC and that the Department had no relevant documents in its possession. It appears that the Department did not, however, transfer the request to the VPC.

On 23 July 1997, Garbutt applied to the Tribunal under s.53(1) for a review of a decision deemed to have been made by the VPC. The Tribunal then notified the VPC of Garbutt's application. The VPC replied that it had received no direct request from Garbutt. The VPC further requested that it be removed as a respondent to Garbutt's application on the grounds that it was not a prescribed authority (as defined) and was therefore not subject to the Act.

Th d cision

The Tribunal refused the VPC's application to be removed as a party.

The reasons for the decision

The issue for the Tribunal to determine was whether the VPC was a 'prescribed authority' by virtue of being a 'body corporate established for a public purpose by or in accordance with an Act'.

After reviewing a number of previous decisions on point, the Tribunal noted that in determining whether a body has been established for a public purpose it is necessary to look at the particular body in question and consider matters such as why it was established, its structure, how it operates and its relationship to the public.

After having regard to the matters referred to in the previous paragraph, the Tribunal concluded that the VPC was a body corporate established for a public purpose and was therefore a prescribed authority for the purposes of the Act. There were three main reasons for this conclusion. First, s.18 of the *State Owned Enterprises Act* stated that the 'principal objective of each State business corporation [of which the VPC was one] is to perform its functions for the *public benefit*' (emphasis added). Second, the VPC was subject to a high level of control by the Minister. Third, the VPC could be required to pay a dividend to the State if so determined by the Treasurer. Additionally, the public nature of the powers conferred on the VPC and its taxation position were also of relevance.

Accordingly, the Tribunal found that the VPC was subject to the Act and the VPC's application to be removed as a party was refused.

Comments

In my view, there is some doubt as to whether the Tribunal had jurisdiction to entertain Garbutt's application for review. This is because s.50(2)(a) (the section that confers jurisdiction on the Tribunal) has no application unless the agency in question first receives a request either directly from an applicant or indirectly though a transfer under s.18.

In the present case, the VPC did not receive a request directly from Garbutt and the Department apparently did not transfer its request to the VPC under s.18. It is therefore difficult to see how the VPC could have made a decision, deemed or otherwise, that was capable of review by the Tribunal.

[C.P.R]

HARRIS and MORNINGTON PENINSULA SHIRE COUNCIL (No. 1997/23862)

Decided: 24 June 1998 by Mattei PM.

Section 30 (internal working documents) — Section 38A (Council documents) — Section 50(4) (public interest override).

Factual background

In 1992, the respondent Council purchased land adjacent to Harris' property in Rye. There was some doubt as to whether the officers who entered into the contract to purchase the land had the authority to do so.

Procedural history

On 27 September 1996, Harris requested access to documents relating to the Council's purchase of the land. A number of documents were released to Harris but, at the hearing, nine documents remained in dispute. These documents comprised:

- two documents containing a consultant's notes;
- three confidential reports and a memorandum prepared by the consultant for the consideration of the Council's Special Purposes Committee; and
- three sets of abbreviated minutes of closed meetings of the Special Purposes Committee.

The decision

The Tribunal affirmed the Council's decision in all respects.

The reasons for the decision

Section 30(1)

The Tribunal found that the two documents containing the consultant's notes were exempt under s.30(1). The first document was held to be exempt on the basis that it was a draft of what was subsequently incorporated into one of the confidential reports. The second document was held to be exempt on the basis that it contained an opinion the release of which would tend to inhibit the frankness and candour of record keeping in local government.

Section 38A

The Tribunal accepted that the three reports and the memorandum were all prepared by the consultant for the consideration of the Special Purposes Committee at various closed meetings, and noted that one of the reports and the memorandum were in fact considered by that Committee. The Tribunal held that all four documents were exempt under s.38A(1)(d) on the basis that their disclosure would involve the disclosure of deliberations or decisions of a closed meeting of the Committee.

The Tribunal held that the abbreviated minutes of the closed meetings were exempt under s.38A(1)(a) as being the official record of official deliberations or decisions of a closed meeting. It also held that those documents were exempt under s.38A(1)(d) on the basis that their disclosure would involve the disclosure of deliberations or decisions of a closed meeting.

Section 50(4)

Harris argued that the public interest required the release of the documents in dispute for reasons relating to the integrity and probity of the Council's behaviour generally in 1992 and in relation to the purchase of the land in particular. The Tribunal rejected this argument. It formed the view that the Council did not engage in any impropriety regarding the purchase of the land. Accordingly, the Tribunal did not order the release of the documents pursuant to the public interest override.

Comments

1. The Tribunal assumed, without discussion, that s.38A applied to special committees of local councils. It is not clear whether this assumption is valid. In essence, the s.38A exemption is concerned with 'closed meetings'. A 'closed meeting' is defined in s.3 of the FoI Act to mean, in relation to a council, a 'meeting closed to the public under s.89(2) of the Local Government Act 1989'. The word 'council' is defined in the FoI Act to have the same meaning as in s.3(1) of the Local Government Act. That Act does not define 'council' to include special committees of the council. Moreover, s.89 of that Act draws a distinction between closed meetings of councils and closed meetings of special committees.

In my view, since:

(a) s.89 of the Local Government Act draws a distinction between closed meetings of councils and closed meetings of special committees;

(b) the definition of 'closed meeting' in the FoI Act is confined to 'councils';

(c) the definitions of 'council' in both the FoI Act and the Local Government Act do not include special committees of councils; and

(d) the language of s.38A, unlike the Cabinet documents exemption in s.28, makes no reference to committees of councils

it is arguable that the s.38A exemption applies only to closed meetings of councils and has no application to closed meetings of special committees.

2. Even if s.38A applies to special committees, the Tribunal appears to have taken a fairly expansive view of s.38A(1)(d). That section relates to documents the disclosure of which would disclose any deliberation or decision of a closed meeting. In the present case, two of the confidential reports were held to be exempt under this section even though the Tribunal did not refer to any evidence to suggest that those reports were in fact tabled and considered by the Committee. In my view, it is difficult to see how the disclosure of a document could reveal the deliberations or decisions of a council or committee if that document was never actually considered by that body.

[J.D.P.]

THWAITES and METROPOLITAN AMBULANCE SERVICE (Nos 1997/18297 and 1997/71207)

Decided: 30 July 1998 by Judge Wood VP.

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

Factual background

On 17 March 1994, the respondent Metropolitan Ambulance Service (the MAS) entered into a contract with Intergraph Corporation Pty Ltd (Intergraph) for the provision of computer-aided despatch, mobile data terminal and automatic vehicle location systems and related support services (the initial contract).

Intergraph was subsequently chosen to provide a single system, and support services, to cater for all of the State's emergency services organisations (the Project). The Bureau of Emergency Services Telecommunications (BEST) was established to co-ordinate and administer the Project, which replaced the initial contract.

In April 1997, the Auditor-General handed down a report that identified a number of matters relating to the MAS's former senior management which, according to the Auditor-General, showed a 'total disregard for the Government's outsourcing guidelines and normal tendering processes'. The Auditor-General also handed down a subsequent report in November 1997 recording the results of a performance audit of the MAS.

Procedural history

Thwaites sought access to all documents relating to complaints made about Intergraph's performance under the initial contract and the Project. A number of documents were released to Thwaites and ten documents remained in dispute at the hearing (the Documents). The MAS claimed that the Documents were exempt under s.32 of the Act.

The decision

The Tribunal set aside the MAS's decision and granted Thwaites access to the Documents in full.

The reasons for the decision

Section 32

The Tribunal accepted that a document will be exempt under s.32 if:

(a) it contains a confidential communication between the client (or the client's agents) and the client's professional legal advisers that was made for the sole purpose of obtaining and providing legal advice or is referable to pending or contemplated litigation;

(b) it contains a confidential communication between the client's professional legal advisers and third parties that was made for the sole purpose of pending or contemplated litigation; or

(c) it contains a confidential communication between the client (or the client's agent) and third parties that was made for the sole purpose of obtaining information to be submitted to the client's professional legal advisers for the sole purpose of obtaining advice on pending or contemplated litigation.

Applying these principles, the Tribunal found that eight of the Documents were exempt under s.32.

It found that the withheld information in one document was not exempt under s.32 because it did not relate to the *contents* of the legal advice provided but rather identified or described the *topic* that was the subject of the advice.

It found that another document, which was a letter from the MAS to BEST, was not exempt under s.32. The MAS had already released most of that document to Thwaites: the withheld information contained a reference to legal advice received by the MAS. The Tribunal found that the withheld information was not privileged because the legal advice was not communicated by the MAS to BEST on a confidential basis. The Tribunal also observed that there was no evidence from which it could conclude that the information was privileged by virtue of common interest privilege or joint privilege.

Section 50(4)

Having found that eight of the Documents were exempt under s.32, the Tribunal then went on to consider whether those documents should be released pursuant to the public interest override found in s.50(4).

According to the Tribunal, the following questions must be considered when determining whether to exercise the discretion found in section 50(4):

(a) What is the matter of public interest rather than what is the matter the public is interested in?
(b) Are there any countervailing matters of public interest that may be prejudiced by release of such document or documents?
(c) Having identified the matter of public interest, does the release of a document or documents contribute in a relevant sense to the public good?
(d) Is the document of such significance to the public interest that its release is required for that purpose?

The Tribunal did not consider the questions referred to in the previous paragraph in turn. The approach actually taken by the Tribunal is summarised below.

First, the Tribunal referred to Thwaites' 13 grounds of public interest in support of his application. Those grounds were summarised as follows:

(a) the public interest reflected in the underlying rationale of the Act itself (i.e. the public interest in holding government accountable and the public interest in fully informed public debate about the workings of government);
(b) the public interest in ensuring that the MAS's employees and consultants did not adopt improper practices that impact adversely upon the provision of adequate public health services; and
(c) the public interest in ensuring that the provision of ambulance services is adequately overseen by the Minister for Health and the Department of Human Services.

Second, the Tribunal observed that its predecessor, the Administrative Appeals Tribunal, had recognised that public interest factors of a 'high order' are required to countervail the public interest underlying legal professional privilege.

Third, the Tribunal observed that the public interest must 'require' the release of the Documents. The Tribunal noted the MAS's argument that the public interest did not require the release of those documents because the Auditor-General had 'covered the issue'. The Tribunal rejected this argument on the grounds that the content of the legal advice provided was not the subject of the Auditor-General's reports and that those reports did not indicate whether the MAS followed such advice or acted responsibly.

Fourth, the Tribunal found that the Documents were relatively innocuous and would not prejudice negotiations with Intergraph. The Tribunal concluded that the operations of the MAS, and thereby the community, would not be disadvantaged by the release of those documents.

And fifth, the Tribunal observed that the Documents, if released, would serve to establish that the MAS took legal advice in relation to certain disputes arising under the contracts, would serve to indicate what documents the MAS provided to its solicitors for such advice, and would reveal the substance of such advice. According to the Tribunal:

> The community will then be in a position to better evaluate whether the disputes may have been avoided on the part of the respondent by negotiating a more favourable agreement at the outset; whether in the circumstances in which it was placed it provided all relevant information to its solicitors and thirdly whether, in the light of the advice which it received, it acted responsibly.

The Tribunal held that the public interest in the provision and maintenance of ambulance services called for the release of the Documents. It concluded by noting that their release 'will enable the community to determine whether the [MAS] conducted itself in accordance with its statutory obligations' and that 'without them, they would be unable to do so'.

[J.D.P.]

CARTER and DEPARTMENT OF HUMAN SERVICES (No. 1997/69967)

Decided: 11 August 1998 by Deputy President Galvin.

Section 33(1) (personal affairs) — Section 35(1)(b) (confidentiality) — Section 50(4) (public interest override).

Factual background

Carter worked in the Southern Metropolitan Region Protective Unit of the respondent Department. His duties involved the care of young persons under the guardianship or in the custody of the Department (clients). Carter was stood down in May 1997 after complaints were made about his conduct (due to a potentially inappropriate relationship between Carter and a client). He resigned before any charges were laid against him.

Procedural history

Carter requested documentation generated by the Department regarding himself. The Department released a number of documents to Carter but claimed that the remainder were exempt. All but two of the documents in dispute were case notes made by a protective worker in regard to a client; the other two documents were incident reports prepared by an officer of the Department. Carter applied to the Tribunal for a review of the Department's decision, asserting that the disclosure of the documents in dispute would enable him to establish that the complaints made about his conduct were not properly investigated.

The decision

The Tribunal affirmed the decision of the Department in all respects.

The reasons for decision

Section 33(1)

The Department claimed that one of the case notes was exempt under s.33(1). The Tribunal held that, on its face, the document related to the

personal affairs of a client. The Tribunal observed that, pursuant to s.33(1), whether disclosure would be unreasonable in the circumstances requires the balancing of the client's right to privacy against the right of the public to information of the agency under the Act. The Tribunal concluded that it would be unreasonable to disclose the documents for two reasons. First, disclosure would not further Carter's declared interests. Second, disclosure would be likely to impair the relationship between protective workers and clients and thereby inhibit the work of the Department.

Section 35(1)(b)

The Tribunal found that the information in the remaining case notes was communicated to the Department in confidence. The Tribunal also found that it would be contrary to the public interest to release these case notes on the basis that such disclosure would be likely to adversely affect the flow of information from clients to protective workers. This, according to the Tribunal, would impede an important function of the Department. The Tribunal concluded that the case notes were exempt under s35(1)(b).

The Tribunal also found that the two incident reports were exempt under s.35(1)(b) for the same reasons.

Section 50(4)

No public interest consideration was identified by the Tribunal as requiring access to the documents pursuant to s.50(4). The Tribunal stated: 'where the material touched upon the applicant, it is either simply a record of opinion of clients, reported hearsay, patently innocuous, to a lesser extent, expressive of some possible or perceived cause for concern without any conclusion being reached or stated or reported intention of reference to a superior'. The Tribunal found that none of this had the potential to further Carter's interests or concerns. The Tribunal noted in passing that there may have been a stronger argument for release of part of the material pursuant to s.50(4) had charges been laid against Carter.

[A.K.]

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