NSW FoI DECISIONS

ADMINISTRATIVE DECISIONS TRIBUNAL

DAWSON v THE COMMISSIONER, HEALTH CARE COMPLAINTS COMMISSION [1999] NSWADT 57

D cid d: 30 July 1999 by N. Hennessy, Deputy President.

Freedom of Information Act 1989 (NSW)

Clause 6, Schedule 1 — personal affairs — does name constitute personal affairs — name on list of psychiatrists used to review complaints — would disclosure be unreasonable?

Clause 13(b)(i), Schedule 1 — information obtained in confidence.

Health Care Complaints Act 1993 (NSW)

Section 30 — reports by experts on matters subject to a complaint — confidentiality of identity of reviewers.

Background

The Health Care Complaints Commission (HCCC) was created in 1993 to provide a statutory apparatus for the receipt and handling of complaints about health care providers. The HCCC took over the role of the former Medical Complaints Unit of the Department of Health, which had not been created by statute but had operated by way of various administrative mechanisms.

One of the features of complaints against health care workers is the need to obtain opinions from peers about the standard of the work subject to the complaint.

Under s.30 of the *Health Care Complaints Act 1993* the HCCC may obtain a report from a person who is considered to be sufficiently qualified or experienced to give expert advice on the matter.

Under the Act a person providing a report is required by s.30(3) to include the following statement:

> I have/do not have a personal, financial or professional connection with the person against whom the complaint is made. Particulars of the connection are as follows:
>
> Dated this day of 19 .
>
> Signature.

In addition, guidelines are available for all reviewers. Part of the guidelines on confidentiality state:

> The practitioner subject of the complaint (the respondent) and the complainant will not have access to the identity of the reviewer unless the matter is referred to a disciplinary hearing, but will be entitled to know the speciality and details of the declaration of connection as required under the Act.

The HCCC maintained lists of people who were on various review panels and the evidence to the ADT showed the HCCC had changed the way it compiled its lists of panel members. Previously names were placed on the panel lists by informal recommendations, but more recently a person must provide their CV and be interviewed by a senior officer. Participation is voluntary and fees are paid for reports or for witness appearances.

In late 1998 the HCCC had written to the 400 members of its panels to advise them of the new arrangements and to obtain up to date CVs. Apparently some 20 to 30 wrote back to advise they did not know they were on the panels.

History of the FoI application

Dr Dawson sought access to the names of the psychiatrists on the HCCC's panel for its Peer Review Scheme. The history of her application is as follows:

- 30 July 1997: application for list of names of all psychiatrists on the register.
- 22 August 1997: request refused in full.
- 25 September 1998: application for internal review.
- 12 October 1998: refusal of application on basis of clause 13(b)(ii) of Schedule 1 of the *FoI Act*.
- 4 February 1999: application to Ombudsman for external review.
- 4 May 1999: application to ADT — this application noted the Ombudsman expected a reply from the HCCC about 18 May 1999.

31 May 1999: HCCC sends fax to 25 psychiatrists on panel advising them of FoI request and asking them if they objected to the release of their names.

- 3 June 1999: at a meeting the HCCC Commissioner provided the applicant with the names of 14 people on the list and advised others were being consulted with a view to providing their names; but also advised the identity of those who objected to their names being released would not be provided.
- 10 June 1999: at a Directions Hearing the ADT ordered the HCCC to provide a Statement of Reasons regarding those names that had not been disclosed. Subsequently eight more names were provided and the HCCC claimed it had now supplied the names of all those on the list, thus satisfying the application.

The matter did not end there.

Argument and ADT analysis

Three arguments were raised about the release of the names on the list.

Names not validly on list

The HCCC had supplied 22 of the 25 names of psychiatrists on its panel. The fight now was on for the names of the other three.

In response to the HCCC's fax of 31 May 1999 these three replied as follows:

Person A: 'I do not hold a position on your review panel and have no desire to do so. Please remove my name from your list and do not release it to any member of the public.'

Person B: 'Your fax prompted me into action as I had been planning to withdraw from the peer review panel. This is a formal notice of my resignation.'

Person C: Sought further information from the HCCC about the peer review scheme as she was unaware she was on the list but asked for removal of her name in the meantime.

As a result of the actions of A, B and C the respondent argued they were no longer on the list so the application had been complied with in full: in other words the list was 25 names, it was now 22 and these names had been supplied. The applicant disagreed.

The ADT did not accept that A and C were not validly on the list, because of their ignorance of the fact. As there were no legislative criteria about the process of appointment the HCCC's records showed they were on the list and their lack of knowledge could not change that fact.

In any event the HCCC argued the three had resigned so the applicant ceased to be entitled to the names. At this point the ADT observed the original FoI application was made in 1997 seeking 'current' names on the register. The HCCC had been supplying names of those on the register as at May 1999. No evidence was given about any changes over those two years. The applicant was only entitled to names on the register as at 30 July 1997, but as the HCCC was prepared to disclose the current list, and the applicant was prepared to accept it, the Tribunal rejected the view the names of those who had resigned were not subject to the application.

Clause 6(1)

This clause creates an exempt document if disclosure would '... involve the unreasonable disclosure of information concerning the personal affairs of any person ...' Two issues arose: were the names sought 'personal affairs' and would disclosure be 'unreasonable'?

The Tribunal started by acknowledging the effect of *Perrin's case* (1993) 31 NSWLR 606, especially the view that the onus is on the agency to justify any decision to withhold documents.

It also reinforced and built upon the views expressed in *Gilling v Hawkesbury City Council* [1999] NSWADT 43 regarding the balance between the public interest in personal privacy and the public interest in having open access to information (see the summary of *Gilling* in (1999) 82 *FoI Review* 68).

After noting various Commonwealth and Victorian decisions about 'personal affairs' it had examined in *Gilling* that made clear they 'cannot be precisely or exhaustively defined' the ADT adopted the view of Kirby P in *Perrin's case* that: 'In its context, the words "personal affairs" mean the composite collection of activities personal to the individual concerned' (at 625).

Names were generally not part of personal affairs but this was a question of fact in every case. The HCCC sought to distinguish *Perrin's case* on the basis it dealt with police officers who had prepared reports as part of their public duties. The doctors on its panels were private practitioners who could have their names removed from the lists at any time.

The context in which the names appeared had to be examined. They were names on a list of people who may be selected to give advice on complaints received by the HCCC. The ADT stated:

> 31. What would be disclosed if the names of these three people were released would be the fact that they were, as of 31 May 1999, on the HCCC's list of psychiatrists. The respondent maintains that disclosure reveals their identity, their occupation and the fact of their involvement with the HCCC. In my view it also reflects the fact that a public agency has viewed their expertise in their chosen field of medical practice as sufficient to justify them reviewing the conduct of their professional peers. In this sense the information reflects positively on their professional reputation.

The Tribunal endorsed the comments of Beaumont J in *Re Williams* (1985) 8 ALD 219 at 222 to the effect information about work performance or capacity is not private so usually would not be part of their 'personal affairs'. The Tribunal agreed and stated:

> 33. ... Prima facie there is nothing 'personal' about somebody's name being on a list of professional psychiatrists held by a public agency. It does not matter that these practitioners were not public servants or that they could remove their names at any time. What matters is the nature of the information interpreted in its context. The information in question does not relate to their family or personal relationships, their financial or health status or any other matter personal to them. It relates to their identity and competence as a professional person. For these reasons the information does not concern their personal affairs.

As to the issue of unreasonable disclosure the ADT examined it on the hypothetical basis it was wrong on whether the information concerned the personal affairs of A, B and C. It stated:

> 35. Some of the factors which are relevant to the question of unreasonableness are: the views of the third parties; the nature of the personal affairs involved; the circumstances in which the information was obtained; the nature and extent of any prejudice to third parties if their names are disclosed; the current relevance of the information and whether disclosure would serve the public interest purposes of the legislation.

The ADT had no doubt the three parties did not want their names disclosed. The information only related to their professional position. Their names were on a list, albeit in some cases without consultation, but there was no evidence of any prejudice they would suffer upon disclosure. There would be prejudice if the name of a person conducting a review was disclosed but the guidelines covered this.

While the information was not current this did not mean it had no current relevance. The ADT thought this issue related to whether there was any public interest in releasing the names. Apparently neither side addressed this. The Tribunal continued:

> 42. The applicant submitted that 'at any time any list of the Commission's accredited and periodically available advisers, relevant to any period, and to any group of health service providers, should be accessible'. The applicant argued that the public must be in a position to monitor the suitability of persons on the list. She said that 'legitimate scrutiny and comment may safeguard the public interest, by minimising the likelihood of the Commission being influenced by misleading 'expert ' advice from unduly diffident, unorthodox or unprincipled persons. She also said that public knowledge of the people on the list would protect the HCCC from corrupt influences.
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> 43. Even though the HCCC has changed its procedures for appointment to the various lists, there is no reason as a matter of principle, why they should not be subject to scrutiny in relation to the suitability of people who are no longer on the list. The fact that poor selection processes have been recognised and addressed does not mean that the HCCC is no longer accountable for their former processes. That accountability will be served by making the full list available to the public.

As the disclosure would serve the public interest purposes of the legislation the ADT found that even if the information did concern personal affairs disclosure would not be unreasonable.

Clause 13(b)(i)

This clause creates an exempt document if disclosure would disclose information obtained in confidence.

In relation to one of the three names the HCCC argued the person knew they were on the list and would

have agreed to the guidelines. While the person had now resigned they could rely on the guidelines to infer confidentiality.

The ADT rejected this view on the basis the confidentiality applies to review of a particular complaint not merely to the obtaining of the name to be placed on a list.

ADT order

The ADT set aside the HCCC's decision not to disclose the names of psychiatrists as at 31 May 1999. It ordered that the complete list be disclosed, including the names of those practitioners who have resigned since that date.

Comments

This decision should provide an incentive to agencies to get their internal records and processes in order. On a broader level it raises an issue to do with peer review in the health care area.

If as a result of this decision other members of peer review panels seek to remove their names, for whatever reason, then it could be argued the HCCC will have a smaller pool of experts available to it to do its work. The HCCC suggested people would not want it known their names were on the lists. Citizens who are registered health care workers should carry out such peer review in the interests of the public and not be swayed by adverse reactions within their particular industry or other factors. The ADT, as noted above, considered being on a list reflected positively on professional standing.

One way of ensuring the activities of the HCCC are not impeded is to make it a condition of registration for any health care worker that they will participate in the peer review process if required to do so. It would still be up to the HCCC to determine whose advice it will seek (as currently provided for by s.30 of the *Health Care Complaints Act 1993*) but any opprobrium attaching to participation in such a process would be eliminated because of the registration requirement and everyone would know who was potentially in the pool of people to be called upon to report.

[P.W.]

GULLIVER v GENERAL MANAGER, MAITLAND CITY COUNCIL [1999] NSWADT 67

Decided: 9 August 1999 by N. Hennessy, Deputy President.

Freedom of Information Act 1989 (NSW)

Section 16 — legally enforceable right of access to documents.

Section 17 — obligation on applicant to supply information as is reasonably necessary to identify documents.

Section 19 — agency may not refuse application unless it takes reasonable steps to enable applicant to provide information to identify documents.

Administrative Decisions Tribunal Act 1997 (NSW)

Section 88 — discretion to award costs – special circumstances.

Section 126 — discretion to allow publication of names of people in Tribunal proceedings.

Introduction

Mr Gulliver lodged two FoI applications on Maitland City Council. He also lodged an application to the ADT.

According to the ADT there were two main issues in this matter: did Maitland City Council (MCC) have any other documents in its possession which it was not producing in response to the applications and did certain documents come within the scope of the applications?

Background

A somewhat messy decision can best be understood by way of a chronology of all dealings between the parties. We get a partial picture of an apparently long period of dealings between the applicant and the Council. The events revealed by the ADT's decision are as follows:

- 12 October 1995: Mr Gulliver has a meeting over the counter with a member of staff of MCC's Development and Environmental Services Division. A record is apparently made of this meeting by MCC staff.

16 October 1995: Letter to Mr Gulliver from MCC's solicitors dealing with the 12 October meeting and referring to certain alleged untrue and defamatory statements made about a Council officer.

- 30 January 1996: MCC's solicitors perused file regarding Mr Gulliver and invoiced MCC for its time to do so.
- 8 March 1996: MCC writes to applicant setting out the procedures to apply in future to dealings between him and Council staff.
- 11 September 1997: Submission by MCC to 'Commissioner, Maitland Public Inquiry'. Apparently the submission dealt with the cost to MCC in dealing with Mr Gulliver's inquiries.
- 19 October 1998: Mr Gulliver makes first FoI application seeking a copy of the submission of 11 September 1997 including details of legal costs and the calculation of staff costs and time.
- ? October to December 1998: some documents were provided to Mr Gulliver formally while others were given informally after discussion.
- 22 December 1998: application for Internal Review.
- ? December/January 1999: response by MCC to internal review to effect no other documents could be identified in the council's records relating to the application of 19 October 1998.
- 12 January 1999: Mr Gulliver lodges application with ADT.
- 1 April 1999: Mr Gulliver lodges second FoI application on MCC seeking details of staff costs connected with the solicitors costs incurred on 30 January 1996. As earlier it appears some documents were provided formally and some informally after discussion in response to this application. Consideration of the responses to this application was also carried out by the ADT, although it is not clear if internal review was sought of the Council's determination of this application.

Dealing with the issues

The ADT identified ss.16, 17 and 19 of the *FoI Act* as relevant: s.16 providing for a legally enforceable right to gain access to documents, s.17 dealing with applications containing information enabling identification of documents sought and s.19 requiring agencies to take steps to assist applicants to provide such information.

Mr Gulliver had sought details of how the cost to the MCC of staff time

in dealing with him had been calculated. He similarly sought details of how the amount of MCC staff time spent dealing with him had been calculated.

The MCC asserted to the ADT it could find no further records showing how either the cost or time calculations were made. Mr Gulliver accepted this. He also identified documents such as faxes, orders and a record of conversation relating to a proposed defamation action against him, copies of which were presumably not supplied.

The application of 19 October 1999 sought details of legal costs and other calculations. The applicant received the solicitor's bill of costs, which referred to other documents, probably regarding the proposed defamation action, which he thought would be on the Council's legal file.

The Tribunal considered the documents mentioned in the bill of costs did not come within the scope of his application. It stated 'Records relating to legal costs do not include the contents of the file to which those costs relate. Mr Gulliver would need to make a separate application for access to the contents of the legal file' (para 18).

Similarly Mr Gulliver sought additional documents, such as orders or information, supplied under the invoices raised by the solicitors, but again the Tribunal said such documents would not relate to the costs. Mr Gulliver had asked for details of the legal costs and the ADT considered he had received them.

Back in 1995 in the letter to Mr Gulliver the MCC's solicitors had referred to a record of a conversation on 12 October 1995. The applicant claimed no copy of that record had been supplied in response to his application. The Council told the ADT no such record could be located, but the Tribunal considered it would not have been covered by his application, even if a document fitting that description was located.

The ADT affirmed the Council's decisions regarding access to documents for the FoI applications of 19 October 1998 and 1 April 1999.

Pow rs of the ADT

In one interesting observation the Tribunal stated:

> 16. The respondent provided evidence, which the applicant accepted, that they did not have any further documents coming within the scope of the application. Even if the applicant had not accepted the respondent's evidence, the Tribunal has no power to order a search of the respondent's records.

The issue of what to do where an agency reveals the existence of a document but it cannot be located goes to the heart of the *FoI Act*. If the legally enforceable right of access to documents in s.16 is to mean anything, either the current legislation does entitle the ADT to order a search or there is a lacuna in the legislation, in need of urgent filling. In this case the ADT drew a distinction between documents that did exist and whether they were covered by the FoI applications made. If a document cannot be found or rational analysis suggests a particular document should exist (issues alluded to by Murrell J of the NSW District Court in *Neary v State Rail Authority*, 7 November 1997 — see the report in (1998) 76 *FoI Review* 59 at 60) then it seems the ADT should be in a position to do something.

Whether the ADT has such a power is briefly discussed in (1998) 78 *FoI Review* 84 at 88, but perhaps it needs to be considered further, especially if it were considered amendment of the *ADT Act* was needed.

Other issues: costs and publication of names

The MCC sought an order for costs under s.88 of the *ADT Act* on the basis there were present the 'special circumstances' required by the section. The 'special circumstances' were the fact the Council had provided all the documents in its possession and had written to the applicant requesting he withdraw his application.

The ADT considered the action had been brought in good faith and the applicant had received no advice about his prospects of success. In the circumstances no costs order was made, but given the costs to the MCC the applicant was urged to seek legal advice (and a community legal centre was suggested) before he made further applications to the Tribunal.

The discretion to award costs is an important part of the policy underpinning the operation of the ADT. The President had canvassed this issue in another (non FoI) case dealt with by the Tribunal. In *Hurt v Director-General, Department of Fair Trading* [1999] NSWADT 50 (8 June 1999) O'Connor DCJ had noted the scheme of the legislation had changed significantly the usual rule of costs following the event. He identified the right of people to have decisions externally reviewed as an important one.

Certainly in FoI matters awards of costs would serve to deter people going to the ADT, leaving the only other external review available via the Ombudsman, who does not have the same powers as the ADT.

A second matter concerned whether the Tribunal should consent to the publication of names of those persons involved in the proceedings. Section 126 of the *ADT Act* prohibits this without the Tribunal's consent. Mr Gulliver sought such consent while the respondent claimed the Tribunal could not give blanket consent to publication of the names of persons.

This section of the ADT's powers had been the first matter to go to the NSW Court of Appeal concerning the Tribunal's operation. In *Lloyd v Veterinary Surgeons Investigating Committee* (25 March 1999) the Court of Appeal referred back to the Appeals Panel of the Tribunal the decision of a single member consenting to the publication of the name of a person in proceedings before the Tribunal.

In its decision in *Lloyd v TCN Channel Nine Pty Ltd* [1999] NSWADTAP 3 (27 July 1999) the Appeal Panel reversed the single member's decision consenting to publication. In the course of its reasons the Panel enunciated certain principles that may be relevant to the exercise of the discretion to consent to the publication of names. These principles were taken into account in the case of Mr Gulliver.

In considering the matter the Tribunal thought no privacy issues justifying non-publication were raised nor was publication likely to harm anyone. Publication was also thought likely to promote a better understanding of the Tribunal among the public. An appropriate approach in an FoI case one would think.

[P.W.]