Comments

With respect, the correctness of the following aspects of the Tribunal's decision may be doubted:

1. The Tribunal held that the information in the Agreement was information 'acquired by' the Authority from St John Ambulance Australia. There is a large body of authority for the proposition that, generally speaking, government contracts relating to matters of a business, commercial or financial nature do not contain information 'acquired by' the agency for the purposes of s.34(1). Those authorities, which are discussed in Kyrou and Pizer, *Victorian Administrative Law* (looseleaf service, LBC Information Services) at [2357/1], were not referred to in the Tribunal's decision.

2. The Tribunal held that disclosure of the parts of the documents remaining in dispute would be likely to expose St John Ambulance Australia unreasonably to disadvantage. This conclusion reflects a much more relaxed attitude to the recent amendments to s.34 (introduced by the *Freedom of Information (Miscellaneous Amendments) Act 1999)* than the approach adopted in *Re Byrne and Swan Hill Rural Shire Council* (2000) 86 *FoI Review* 24. *Byrne's* case — which in my view more accurately reflects Parliament's intention to reduce the scope of s.34 — was not referred to in the Tribunal's decision.

3. The Tribunal held that disclosure of the parts of the documents remaining in dispute would expose the Authority to disadvantage. But this is not sufficient to justify a finding that those parts were exempt under s.34(4). To be exempt under that section, it is necessary to establish that disclosure would be likely to expose the Authority *unreasonably* to disadvantage. The Tribunal made no such finding in the present case. As such, it is difficult to see how those parts of the documents were exempt under s.34(4) of the Act.

4. The Tribunal held that disclosure of the parts of the documents remaining in dispute would impair the Authority's ability to deal candidly with commercial bodies in the future. But this is not sufficient to justify a finding that those parts were exempt under s.35(1)(b). To be exempt under that section, it is necessary to establish that disclosure would be reasonably likely to impair the ability of the Authority to obtain similar information in the future. The Tribunal made no such finding in the present case. As such, it is difficult to see how those parts of the documents were exempt under s.35(1)(b) of the Act.

[J.D.P.]

NSW FoI DECISIONS

ADMINISTRATIVE DECISIONS TRIBUNAL

CGEA TRANSPORT ASIA PACIFIC PTY LTD v DIRECTOR-GENERAL, DEPARTMENT OF TRANSPORT [2000] NSWADT 128

Decided: 13 September 2000 by K O'Connor DCJ, President.

Freedom of Information Act 1989

Clause 7, Schedule 1 — business affairs — insufficient evidence to determine factual issues — onus not discharged

Clause 10, Schedule 1 — legal professional privilege — exemption can be claimed by any agency — significance of 'would' in exemption

Background

CGEA, a bus company, believed it had an exclusive right to acquire another bus company. As things eventuated the NSW State Transit Authority purchased N & W, the company of interest to CGEA.

An FoI application was made on the agency seeking copies of a wide range of documents involving communication between the Department of Transport and the STA, a number of companies, reports to the Minister for Transport and any report made to Cabinet. The Department granted access to all the information sought, with a few exceptions.

The sole document that untimately remained in dispute, which led to the application to the ADT, is described in four places in the Tribunal's decision. In para 2 of the decision it states:

> That document dated 6 December 1999 takes the form of a combined fax cover sheet and first page of a two page letter to the Department from the firm Andersen Legal, acting for the STA.

Later in the decision, at para 11 it is described as follows:

> The document for which the exemption is claimed is one that passed between the solicitors for N & W and the STA. It is a document in the possession of the Department.

In para 22 the ADT states it has looked at the document and is satisfied it arose from a lawyer-client relationship between Andersen Legal and the STA. In para 27 the ADT records the applicant's view that is merely a request to the Department for information by Andersen's, on behalf of the STA. It is also suggested by the Department (para 25) that there is a prospect of litigation between CGEA and the other bus company and the STA about the sale of the business.

The Department relied on two exemptions: legal professional privilege and documents affecting business affairs. The parties also agreed, after a case conference and the filing of written submissions, for the ADT to deal with the matter on the papers, without a hearing (s.76 *ADT Act 1997*).

As to the business affairs exemption, the ADT decided it did not have enough evidence to resolve the factual issues associated with applying the exemption to the document in question. It decided the case for the exemption had not been made out by the agency, especially given its onus under s.61 of the *FoI Act.*

Clause 10 — legal professional privilege

The Tribunal here pointed to the High Court's recent view that the common law test for privilege is the dominant purpose one, where the *Evidence Act* is not applicable. For background to earlier ADT approaches to this exemption and a reference to the High Court's decision in the *Esso* case, see (2000) 87 *FoI Review* 38–40.

In this case the Tribunal was faced with a document that emanated from a third party:

> '14 The difficulty that the present application presents is that the Department has invoked the exemption in a situation where it is not the client, but a third party, the STA, is. The applicant objects to this course of action in that there is no evidence as to whether the STA wishes to invoke the privilege. It is clear that the privilege is the client's to assert ...'

The Tribunal considers the agency holding the document must ask itself, according to cl.10(1), if the document '... contains matter that would be privileged from production on the ground of legal professional privilege' (para 15). The key issue is the effect of the word 'would' in the exemption. The Tribunal noted the agency receiving the request would usually be the client as well, so is entitled to assert the privilege or not. In this case a regulatory body has come into possession of a document, where it is not the client. No authority was cited to the Tribunal regarding the position of the Department in this case.

Reference was made to an AAT decision suggesting reference needed to be made to the circumstances of the document's creation in order to determine if the privilege might be claimed (para 17). The ADT said:

> 18 In this case the Department has not put any evidence forward as to the wishes of the STA in relation to whether it would invoke or not invoke the privilege. I do not consider it necessary to for an agency to take this step. An agency to which an FoI request is made is entitled to make a judgment based on the contents of the document in its possession as to whether it is a document of the kind in relation to which legal professional privilege might properly be asserted. It is not, I consider, essential for it to contact the third party client on the issue; though that might occur as a matter of prudence. The position in this regard is to be contrasted with those exemptions where there is a 'reverse FoI procedure' requiring contact with the third party: see ss 30–33.

Given the onus on the agency to show a 'determination is justified' the effect of this decision regarding the cl.10 exemption seems to be that an agency can make untested and unchallenged assertions about a document (without either being the agent of the third party whose privilege it is or without any evidence as to the third party's attitude). Curiously in relation to the business affairs exemption, which it rejected, the ADT stated:

> 30 ... Scrutiny of the document in issue in isolation from evidence as to its context does not enable me to reach any firm conclusions. Consequently, the Department has not discharged its onus in relation to this exemption ...

In relation to cl.10(1) the Tribunal asserts the exemption:

> 20 ... Requires the agency assessing the request to ask whether the document 'would be' privileged from production in legal proceedings. It is enough, I consider, to ask whether the privilege could properly attach. It is not necessary to ask whether the third party client would be inclined to invoke or waive the privilege were the context to which the privilege is addressed to arise — pending or current legal proceedings. That decision is one that should be left to be made at that time. An interpretation should not be given to the FoI Act which forces that decision to be taken prematurely.

The issue seems to be whether an agency can assert the exemption in cl.10(1), even if it is not the client with the privilege. In this case the document was voluntarily disclosed to the Department, without any qualification as to its use or distribution, or indeed its confidentiality.

In holding that an agency can assert the privilege the ADT seems to have overlooked cl.10(2), which aids the interpretation of cl.10(1). Clause 10(2) clearly relates to the document, potentially subject to privilege, being included in an agency's policy document, thereby rendering it not an exempt document. It seems only the agency whose document it is can be caught by this clause, as other agencies, such as the Department in this case, are not going to be including material covered by the privilege of another person, in their policy documents. This means that cl.10(1) must be read as implying that the agency that is the client is the only person who 'would be' able to assert the privilege.

The section 25 discretion

The ADT took the view that as no submissions were made on the issue it was not going to address the exercise of its discretion under s.25. If the ADT is to stand in the shoes of the original decision maker then surely it should address the exercise of the discretion independently of any submissions by the parties.

If it were to have done so in this case then the factors relevant to the s.25 discretion for the Department of Transport would be totally different to those relevant for the STA.

Purchase of a public resource

Finally it should be noted that this dispute concerns a public resource — the operation of a public transport network and its disposal. There are interests at stake beyond the private property interests of the parties involved. This is a factor also relevant for the Department, and the ADT, in the exercise of their discretion.

Not one of the most convincing Tribunal decisions.

[P.W.]

ADMINISTRATIVE DECISIONS TRIBUNAL: APPEAL PANEL

Three NSW FoI decisions of a single member ADT are currently before an ADT Appeal Panel. These cases are:

- LATHAM v DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES
  [2000] NSWADT 58
  Decision: 12 May 2000. Appeal by the Department. Directions Hearing 5 July 2000.
- WATKINS v CHIEF EXECUTIVE, ROADS AND TRAFFIC AUTHORITY
  [2000] NSWADT 11
  Decision: 17 March 2000. Appeal by Watkins. Hearing 7 August 2000.
- S v DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES
  [2000] NSWADT 24
  Decision: 17 March 2000. Appeal by Department. Hearing 17 August 2000.

The decisions in each of these cases will be relevant for summaries of decisions on the same issues in other cases.

[P.W.]

STOP PRESS — FEDERAL FOI

On 6 April 2000, Marshall J of the Federal Court held that the decision to issue a Ministerial Certificate under the *Freedom of Information Act 1982* [Cth] was subject to judicial review. *Tanner v Shergold* [2000] FCA 422.

On 10 October 2000 the Full Federal Court (Black CJ, Burchett and Finkelstein JJ) dismissed the appeal by Shergold, a delegate of one PK Reith, Minister for Workplace Reform: [2000] FCA 1420.

The applicant Tanner sought copies of reports 'arising from certain consultancies on waterfront reform'.

More in the next issue.

[P.W.]