

provided to the agency on the other. In both cases the agency ought to consult the third party and the third party ought to have the right to make a 'reverse FoI' application if the agency makes a decision adverse to that party's interests.

In my view, the fact that s.34(3) arguably requires the above distinction to be drawn highlights the fact that the consultation provisions in the Act are inadequate. It may be hoped that the Bracks government, which has expressed a commitment

to reform the Act beyond the reforms introduced by the *Freedom of Information (Miscellaneous Amendments) Act 1999*, will in fact amend s.34(3) (and its counterpart, s.33(3)) to strengthen the position of third parties in Victoria.

[J.D.P.]

FEDERAL FOI DECISIONS

Administrative Appeals Tribunal

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[N.D.]

DALE and AUSTRALIAN FEDERAL POLICE (AFP) (No. N96/897)

Dated: 24 September 1997 by Deputy President McMahon.

FOI Act: Sections 27A; 37(1)(b); 37(2)(a); 41(1).

AAT Act: Section 26.

Application by author/researcher for access to documents concerning murdered prostitute and AFP informant; 'unreasonable' disclosure of personal affairs documents; alteration of a decision after AAT application is made.

Decision

The AAT affirmed the decision, upholding the exemptions claimed by the AFP but varied the decision in respect of documents made available to Dale after the AAT application was made.

Facts and background

Dale was writing a book and an academic thesis about the murdered

prostitute Sallie-Anne Huckstepp. Ms Huckstepp was an AFP informant at the time of her death in 1986. She met regularly with Constables Muir and Smith who pretended to be corrupt in order to obtain information from Ms Huckstepp. Constable Smith admitted to having been involved in a sexual relationship with Ms Huckstepp for several months immediately prior to her death.

After submitting an initial FOI request which was widely couched, Dale narrowed the request to seek access only to those documents specifically referring to Ms Huckstepp or her 'employment' by the AFP.

The AFP released some documents with deletions for which exemptions were claimed and also claimed other documents were wholly exempt. The provisions under which the exemptions were sought were ss.37(1)(b), 37(2)(a) and 41(1).

Findings on exemption claims

Section 37(1)(b)

The documents for which exemption was claimed consisted largely of AFP information reports and an AFP hotline report. The documents revealed, on their face, the source of information provided to the AFP including the names of informants. The AFP gave evidence that information in these sorts of reports is normally kept confidential. One such document included a report of a telephone conversation in which the informant said he was concerned for his life.

The AAT upheld the exemption claimed. The essence of the s.37(1)(b) exemption is to preserve confidentiality for the administration of, in this case, the criminal law. Once that confidentiality is established, 'there is no more to be said'.

Section 37(2)(a)

The AAT upheld the exemption claimed. The AAT observed that the prejudice required for the application for this exemption is not confined to prejudice to a defendant.

There was evidence before the AAT that Arthur (Neddy) Smith was awaiting trial for Ms Huckstepp's murder. Smith's lawyers had been shown the relevant material and there was evidence that the lawyers expressed the view that the material would prejudice his case.

There was also evidence that, because of the notoriety of the case and media interest, there was a possibility that potential jurors would be influenced. This would detract from the effectiveness of both the prosecution and the defence.

Dale had indicated that he was prepared to withhold the information until after Neddy Smith's trial. He offered to have this as a condition of release. The AAT indicated clearly that this condition could not be accepted. It would be too difficult to enforce. Once a document is released to an applicant, it is released to the world (*Searle v Public Interest Advocacy Centre* 108 ALR 163 at 179).

Section 41(1)

Some of the exempt material concerned people who were unknown to the AFP. The AAT upheld the exemption because these people were only marginally involved and, in the context of a criminal investigation, disclosure of the personal information would be unreasonable.

Most of the information was from people known to the AFP. These included Ms Huckstepp's daughter who objected to release of personal information about her mother. The

AAT held that reference to a deceased person in s.41(1) must mean that the views of survivors must be able to be taken into account.

The AAT applied the test of reasonableness in *Colacovski's* case (100 ALR 111; (1991) 33 *Fol Review* 32), that is, it is essentially a public interest consideration. If disclosure is not relevant to public affairs of government and would only satisfy curiosity, disclosure would be unreasonable.

The AAT agreed with the unreasonableness test in *Scholes and AFP* (1999) 80 *Fol Review* 32: the onus is on the agency to advance material establishing unreasonableness; the mere fact of existence of personal information is not sufficient to establish unreasonableness; and in deciding whether to disclose, the AAT must balance competing public interests.

Dale had argued that the duplicitousness of the AFP officers constituted a public interest relevant to the affairs of government. The AAT rejected the alleged fact of duplicitousness because the material related to Constable Smith's admitted personal relationship with Ms Huckstepp.

Dale also argued that there was a public interest because of the notoriety of the case. The AAT rejected this on the grounds that notoriety alone did not constitute public interest.

The AAT noted that the material withheld under s.41(1) did not include the names of police. It is not the purpose of s.41(1) to protect 'the traditional anonymity' of public servants.

Variation of decision — section 26 of the AAT Act

An agency cannot alter a decision after an application has been made to the AAT unless the parties consent. That consent occurred in this case. The AFP released further material after the AAT application was made and the AAT, accordingly, affirmed the decision under review subject to this variation.

Comment

A notable feature of this decision is the clear analysis of the unreasonableness test for the purposes of s.41(1).

[N.D.]

BAYLISS and DEPARTMENT OF HEALTH AND FAMILY SERVICES

(No. Q97/726; Q97/727)

D cid d: 10 October 1997 by Deputy President S. Forgie.

Fol Act: Sections 4, 22, 33, 37, 40, 41, 43, 45.

AAT Act: Sections 35, 37.

Therapeutic Goods Act: Sections 3, 4, 20.

Other legislation: *Customs Act 1901; Customs Administration Act 1985; Postal Services Act 1975.*

Access to documents concerning therapeutic goods and their possible unlawful importation and supply; communications between agencies; possible effect on investigations; communications by an authority of a foreign government.

Decision

The AAT varied the decision under review by substituting its decision that parts of the documents were exempt and that some documents could be released, with deletions.

Facts and background

Bayliss is a medical practitioner who was under investigation by the Department of Health and Family Services (DHFS) for possible breach of the *Therapeutic Goods Act 1989* which regulates importation and supply of certain therapeutic goods. Bayliss had been charged with importing and supplying cervical dilators in breach of the legislation.

Baylis submitted two *Fol* requests, one being for access to a very wide range of documents relating to the evaluation and listing of a variety of dilators while the other request was for access to correspondence between the DHFS and the Australian Customs Service.

At the time of the AAT hearing, Bayliss had been given access to five documents but a further eight documents (identified in both the decision and this summary as Documents 1 to 8) were claimed to be exempt. This decision dealt with seven of those eight documents, Document 4 being the subject of adjourned consideration.

Findings on exemption claims

Section 33(1)(b)

Three documents were held by the AAT to contain material which was exempt because disclosure would

divulge confidential communications with authorities of a foreign government. Those three documents were:

A composite document comprising a communication from the Australian Customs Service to the respondent agency and a confidential communication from United States Customs to the Australian Customs Service (Document 5);

A document by the respondent agency to the Australian Customs Service discussing action and information received from the United States Food and Drug Administration (Document 6); and

A communication from the United States Food and Drug Administration to the respondent agency (Document 7).

The Tribunal was satisfied that all of the bodies mentioned above (whether Australian or United States) were 'authorities', even though 'authority' is not defined in the *Fol Act*. In view of its functions, each had the requisite 'stamp of government' upon it.

The AAT was satisfied on the facts that the relevant information had been communicated 'in confidence' for the purposes of s.33(1)(b).

Section 37(1)(a)

Four documents were held by the AAT to contain material which was exempt because disclosure would, or could reasonably be expected to, prejudice the conduct of an investigation. Those four documents were:

Correspondence from the Australian Customs Service to the respondent agency listing persons suspected of illegal importation (Document 1);

A letter by the respondent agency to the Australian Customs Service containing details of a present and a past investigation (Document 2);

A briefing note or report from the Australian Customs Service in Washington to its Canberra office containing some factual material but also details of enquiries being made pursuant to an investigation (Document 3); and

The document from the respondent agency to the Director of Public Prosecutions identifying subjects of investigation, sources of information and methods of enquiry (Document 8).

The exempt material consisted of the names, and associated information, of people who had been investigated

but who had not been charged; details of types of intelligence and its sources; and details about the focus of an investigation and methods of enquiry.

The AAT rejected the exemption claim in relation to details of people who had been investigated but for whom the time to bring charges had expired. Because there was no possibility of charges in these cases, there was no basis for finding an investigation could be prejudiced.

Section 37(1)(b)

The AAT upheld the confidential source of information exemption only in relation to one document (Document 8). This concerned information provided in confidence by an authority of a foreign government.

Other claims under this exemption were rejected because the AAT did not accept that the source of information was confidential. The fact alone that information has significance in an investigation does not of itself mean that it will necessarily have come from a confidential source.

Sections 37(2)(b) and 37(2)(c)

The AAT rejected claims based on protecting procedures for investigation and protecting public safety in relation to Document 1 on the basis of the contents of that document. Disclosure of self-evident procedures would not necessarily prejudice the effectiveness of those procedures. Similarly, disclosure of methods to protect public safety would not automatically prejudice the protection of that public safety.

Section 40

The AAT rejected exemption claims in respect of all seven documents that disclosure would prejudice the operations of agencies. Again this was based on the Tribunal's examination of the contents of the documents. While certain procedures may have been disclosed in some instances, the AAT was not satisfied that the effectiveness of the agencies would be prejudiced or diminished.

Section 41

The personal information exemption was claimed in respect of all seven documents but upheld only in relation to Document 1. The AAT considered that disclosure of personal information about people who had not been, or would not be, charged

would be unreasonable. The AAT considered it would be unfair to disclose suspicions which might never be acted upon, for whatever reason.

Section 43(1)(c)

The AAT upheld a claim in respect of Document 1 that disclosure of information about people identified in Document 1 could unreasonably affect them in their business or professional affairs. The AAT's reasoning was similar to that indicated above in respect of s.41.

Section 45

The AAT rejected the breach of confidence exemption claim in respect of all four of the documents for which it was claimed. On the evidence, the information contained in the documents had not been imparted in circumstances of confidence or it had not the necessary quality of confidentiality.

Comment

This was a case in which the DHFS appears to have claimed every exemption it possibly could, many of which were rejected by the AAT.

The decision reinforces the importance of being prepared to release documents with deletions rather than claim exemption for entire documents. In view of the small number of documents and small number of folios involved, the AAT considered that it was possible to make copies with exempt materials deleted.

[N.D.]

KHOH and TELSTRA CORPORATION LTD (No. N96/1594)

Decided: 21 January 1998 by Senior Member M.D. Allen.

FoI Act: *Sections 24A, 56(1).*

Access to personal files; whether access extends to all documents referring to an applicant; reasonable steps to find a document.

Decision

The AAT set aside the deemed refusal by the Telstra Corporation Ltd (Telstra) and substituted its decision under which Khoh was entitled to receive her personal file.

Facts and background

Khoh, who may have been confused about what she was entitled to regarding her personal file under the *FoI Act*, sought access in the

following terms: 'I am writing to request to view my personal files while I was employed by Telstra. I believe that under the *Freedom of Information Act* I have the right to obtain access to my personal records.'

Telstra was apparently unable to find Khoh's personal file until immediately prior to the AAT hearing. Because, presumably, no decision had been made, Khoh engaged the AAT's jurisdiction under s.56(1), the 'deemed refusal' provision.

There was some evidence that, at various times during Khoh's employment with Telstra, these two officers had had documents relating to Khoh on their own files or as loose documents.

Because of Telstra's inability to find Khoh's personal file until close to the AAT hearing, Khoh appears to have been suspicious of Telstra. There were, in particular, two officers of Telstra (one of whom had since ceased to be an employee of it) whom Khoh particularly wished to call as witnesses. One was on holidays and unavailable at the time of the hearing. The other had indicated before leaving Telstra that any papers he had concerning Khoh had been placed on her personal file before he ceased to be an employee.

AAT decision

The AAT accepted that Telstra had been unable to locate any documents other than those on Khoh's personal file, which had been given to her, by the time of the AAT hearing.

The AAT accepted that Telstra had taken all 'reasonable' steps, as required by s.24A, to find the relevant documents.

The AAT noted that even though there may have been within Telstra some documents referring to Khoh but not located on her personal file, she had been given access to her personal file in response to her FoI request. This was all that was required of the agency.

Comment

The *FoI Act* does not require an agency to search for documents beyond what is reasonable if such a search fails to find a document or if the document does not exist.

What constitutes 'reasonable' will depend on the particular circumstances.

[N.D.]