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The NSW Administrative Decisions Tribunal: Leading Cases

The NSW Administrative Decisions Tribunal (ADT) was established in October 1998. Its jurisdiction is to undertake merits review of determinations made by decision makers on applications under the *Freedom of Information Act 1989* (NSW). It also has wide and growing jurisdiction to consider decisions made under other specified NSW acts.

Its first FoI decision was handed down in March 1999 *(Taylor v RSPCA* [1999] NSW ADT 23). The total is now around sixty decisions plus five decisions by the Appeal Panel which has jurisdiction to consider applications for review of Tribunal decisions on matters of law (s.113 *Administrative Decisions Tribunal Act 1997* (NSW)).

The purpose of this article is to highlight some of the important decisions by the Tribunal and to provide a point of reference for those in NSW and elsewhere who may be interested in exploring some of these decisions in detail.

Relevant provisions of the NSW *FoI Act* are not reproduced in full. The Act can be accessed at <www.austlii.edu.au>. References to clauses are to the exemption provisions which are contained in Schedule 1 of the Act.

The full texts of Tribunal Decisions are available on <www.lawlink.nsw.gov.au/adt> (General Division of the Tribunal and are listed by year). The website includes a 'view by category of decision' page, which lists some FoI decisions but is not a comprehensive index.

Gen ral approach to interpretation

The Tribunal attaches significance to the objects of the Act as set out in s.5. The objects (and the Second Reading speech) are frequently quoted in Tribunal decisions.

The Tribunal places the onus on the agency to justify any decision to withhold documents. There has been frequent reliance on the view expressed by the then President of the NSW Court of Appeal, Mr. Justice Kirby, in the *Perrin* case *(Commissioner of Police v District Court* NSW [1993] 31 NSWLR 606) that 'to withhold disclosure it is for the agency to make out the application for the exemption. Thus the question properly is not why the information should not be disclosed but why it should be exempted'. (See comments by Deputy President Hennessy in *Gilling v Hawkesbury City Council* [1999] NSW ADT 43).

However, this general approach to interpretation does not extend to a 'leaning position' in favour of disclosure when the Tribunal is required to interpret an exemption which includes a public interest test.

> The Clause 9 exemption [internal working documents] is neutral on whether a document ... falling within the description ... does or does not deserve to be kept secret. [S]ecrecy is only justified if disclosure of something in a particular document would be contrary to the public interest. [This] test requires reflection on the objects of the exemption. This indicates the opinion of the legislature that the public interest requires public openness accompanying or following decision making in some cases but that in other cases it requires secrecy. The neutrality of this position prevents approaching the exemption from any general assumption or presumption on the necessity of secrecy or openness of government deliberative documents.
>
> Judicial Member Smith in *Tunchon v Commissioner of Police* [2000] NSW ADT 73.

In weighing up factors relevant to 'unreasonable' disclosure of information concerning a person's personal affairs the Tribunal must have regard to all the factors in the particular case. It should not adopt a 'leaning' position in favour of disclosure. At its core unreasonableness involves public interest considerations. A fundamental aspect of this will be whether withholding the document is 'reasonably' necessary for the proper administration of the government'. (Judicial Member Robinson in *Gliksman v Health Care Complaints Commission* [2001] NSWADT 47).

Scope to neither confirm nor deny the existence of documents

Section 28(3) does not require an agency to include in a notice of determination information which would render the notice an exempt document. This provision can be used particularly in cases that involve law enforcement and public safety documents (cl.4) to neither confirm nor deny the existence of documents if to do so would result in the notice itself being capable of a claim under this clause. (Deputy President Hennessy in *Ekermawi v Police* [2001] NSW ADT 27; Judicial Member Robinson in *Cerminara v Police* [2001] NSW ADT 95). (Deputy President Hennessy in *Murre (No.2) v NSW Police Service* [2001] NSWADT 175).

Law enforcement and public safety clause 4

The Tribunal has examined a number of the law enforcement and public safety exemptions closely, particularly cl.4(1)(b) (disclosure could reasonably be expected to enable the existence or identity of any confidential source of information in relation to the enforcement or administration of the law, to be ascertained).

In order to relate to the enforcement or administration of the law the information must be relevant to the 'policing of criminal laws or civil obligations'. The exemption is comparable to the police informer privilege but can be used not only by police agencies but by others who have similar powers and responsibilities. It is not relevant to information in relation to licensing functions of an agency where the ultimate penalty may involve the withdrawal of a license. (Mr Smith in *Watkins v RTA* [2000] NSWADT 11).

However it can apply to information that leads to investigation where an offence involving a penalty can be

imposed. Thus it can apply to documents that would reveal a confidential source of information regarding an unroadworthy motor vehicle. The complaint in this instance had led to an inspection and the issue of a defect notice and a failure to comply with conditions contained in such a notice was an offence subject to a fine. This was information related to the process of the enforcement of legal rights or duties. (Deputy President Hennessy in *Odisho v RTA* [2001] NSWADT 49).

When the applicant already knows the source of the information and can satisfy the Tribunal about this, disclosure would not reveal a confidential source (Deputy President Hennessy in *Latham v Community Services* [2000] NSWADT 58).

The name of a police officer obliged to provide information to another agency is not information which would reveal a confidential source. (President O'Connor in *X v Community Services* [1999] NSW ADT 141).

The fact that the information is false or incorrect is not a factor which prevents the exemption being claimed. There is no public interest test to be satisfied in this exemption. (President O'Connor in *Mauger v Wingecarribee Council* [1999] NSWADT 35).

The Tribunal has left open the possibility that malicious complaints should not be protected. (Appeal Panel in *X v Community Services* [2001] NSWADT AP 23).

In *Ingram v Sutherland Council* [2000] NSWADT 69 Judicial Member Fleming held that the identity of a neighbour who had written to a council regarding action and behaviours which might involve a breach of the law may attract this exemption. In this case the identity of the complainant was known to the FoI applicant. The decision is inconsistent with the approach taken in other cases. The information may have been exempt under cl.13(b) but this was not the Tribunal's decision.

Personal affairs cl.6, schedule 1

A person's name in isolation is not necessarily part of their personal affairs but their name linked with their address enables them to be contacted by people who have access to that information. This contact may be unwelcome and constitute an invasion of their privacy". (Deputy President Hennessy in *Gilling v Hawkesbury Council* [1999] NSWADT 43).

Names on a list of professionals maintained by a public agency as part of a peer review process in connection with the examination of complaints reveals nothing about the personal affairs of the persons concerned. (Deputy President Hennessy in *Dawson v Health Care Complaints Commission* [1999] NSWADT 57).

An application for access to the details (names and addresses) of holders of licenses issued by the National Parks and Wildlife Service to cull flying foxes in order to protect their commercial orchards did not involve the unreasonable disclosure of information concerning their personal affairs. An important consideration in weighing unreasonableness was the motive of the applicant who was planning to undertake research and observe the effects of such licences. In this case the motive went beyond mere curiosity and there was no evidence that the applicant intended to harass or otherwise interfere with the affairs of the license holders. (Judicial Member Robinson in *Humane Society v National Parks and Wildlife Services* [2000] NSWADT 133).

Internal working documents (cl.9)

In *Bennett v University of New England* [2000] NSW ADT 8, Deputy President Hennessy considered an application for review of a determination by the University to refuse access to a report prepared for consideration by the Council about the examination of the applicant's thesis for a Ph.D. Following consideration of the report the degree was conferred 14 years after it had been submitted. The report included information about the University's processes in dealing with the thesis. While parts of it had been made available to the applicant, other parts were denied on the basis of the internal working document exemption (and confidentiality — see below).

Deputy President Hennessy found that while the report satisfied the conditions of cl.9(1)(a) in that it contained advice and opinion prepared in the course of and for the purposes of the decision-making functions of the University, disclosure on balance was not contrary to the public interest.

The decision considers a wide range of factors put forward by the University that favoured non-disclosure in the public interest. It found that there was no evidence in this case to support a 'candour and frankness' argument that disclosure would inhibit future pre-decisional communications; that disclosure would not unfairly represent the reasons for a decision subsequently taken, or be unfair to a decision maker or prejudice the integrity of the decision-making process. Given the objects of the Act, the legitimate public interest in knowing whether the University had acted in accordance with the principles of sound administration and the unfavourable reflections on the University's processes, release of the remainder of the report was in the public interest in that it would enhance the openness, accountability and responsibility of the University.

Deputy President Hennessy in this decision attached importance to the fact that the decision-making process was complete and was not persuaded that scrutiny after the event would have any significant prejudicial impact on the University in future.

In *Tunchon v the NSW Police Service* [2000] NSW ADT 73 Judicial Member Smith considered an application for review of a decision by the Police Service to refuse access to a report prepared for the Commissioner by Morgan and Banks about a review of the Human Resources and Development Command and its functions.

In this case after canvassing the various public interest factors for and against disclosure the Tribunal decided that disclosure was on balance contrary to the public interest at this time. The report had not been fully considered or acted upon. It had only been seen by a select group of senior officers. The Tribunal concluded that there were real grounds for a concern that the Commissioner's continuing process of decision making could be seriously impaired by what would be premature release of the report.

In *Bennett v National Parks and Wildlife Service* [2000] NSW ADT 136 the applicant sought access to a document entitled 'Conditional Agreement to lease the Quarantine Station North Head' which had been executed by the Minister of the Environment and two other parties. In denying access the Department argued that the document was part of the preliminary development of a lease, that a series of other steps were required prior to finalisation including consultations with relevant government authorities, the community and other bodies and that

disclosure at this stage could have a detrimental effect on its financial interests if the proposal did not proceed.

The Tribunal concluded that as the deliberative process was not complete, disclosure at this stage would be premature and was on balance contrary to the public interest.

These three cases illustrate that while the Tribunal will protect documents associated with an agency's 'thinking' processes prior to a decision, it takes the view that after a decision has been made it will require evidence of special factors to justify non disclosure.

Where a document is dated and not part of current thinking process it will be hard to argue that disclosure is on balance contrary to the public interest. In *Simpson v Department of Education and Training* [2000] NSW ADT 134. Deputy President Hennessy considered an application for a draft report prepared by a working party on pay, conditions and entitlements of casual teachers. The draft had been prepared in 1994 and reflected matters considered by the working party during its meetings on eight or nine occasions. Agreement on the draft had not been reached by members of the working party and the options in it were never adopted as the official view of the Department or the NSW Teachers Federation.

Many of the issues referred to in the draft had been the subject of subsequent discussions between the Department and the Federation and the parties were still negotiating about pay and conditions for casual teachers.

Deputy President Hennessy commented that:

> ... it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing if there is evidence that the disclosure would adversely affect the decision-making process or that disclosure would for some other reason be contrary to the public interest. In either of those circumstances I consider that the public interest is served by non disclosure. I do not consider it is in the public interest for any agency to conduct its business with the public effectively 'looking over its shoulder' at all stages of its deliberations and speculating about what might be done and why. Generally I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all material available so that informed decisions may be made.

In this case the draft report completed in 1994 had long been superseded. It did not represent either a previous or current negotiating position and was not part of the Department's current thinking processes. The Internal Working Document Exemption was not satisfied in this case.

Legal professional privilege

Whether documents come within cl.10 should be determined by reference to the tests of client legal privilege found in the *Evidence Act.* (Mr M. Smith in *Mangoplah v Great Southern Energy* [1999] NSW ADT 93). (Appeal panel in *Charteris v Leichhardt Council* [2001] NSW ADTAP 12).

The law in Australia is now that legal professional privilege will attach to a confidential communication — oral or in writing — made for the dominant purpose of obtaining or giving legal advice or assistance or for use in proposed or anticipated legal proceedings. However, if privilege has been waived the exemption will not apply. Waiver can be express implied or imputed. Protection can be lost through intentionally disclosing protected materials. An implied waiver occurs when by reason of some conduct on the privilege holder's part it becomes unfair to maintain the privilege. (President O'Connor in *Walden and Toni v Leichhardt Council* [2001] NSW ADT 81. (The Appeal Panel subsequently set aside the decision in this case to release documents as a result of an agreement between the parties. The Appeal Panel did not examine the decision itself [2001] NSW ADTAP 36).

Legal professional privilege extends to confidential communications between the government or agency and its employed legal advisers provided that in giving advice they were acting in their capacity as legal advisers. (Deputy President Hennessy in *Kay v Department of Corrective Services* [2000] NSW ADT 34).

Exemption on the grounds of legal professional privilege can be claimed by an agency even though the privilege was that of another agency. (President O'Connor in *CGEA Transport v Director General Department of Transport* [2000] NSW ADT 28).

Confidentiality

Clause 13(b) seeks to protect information obtained in confidence where disclosure could reasonably be expected to prejudice the future supply of such information, and is on balance contrary to the public interest.

The Tribunal's view in several cases is that information provided by public servants to other public servants will not usually meet the second of these criteria — that is, that disclosure would prejudice the future supply of information particularly where the employees have a legal duty to cooperate in providing information of the kind requested (Deputy President Hennessy in *Bennett v University of New England* [2000] NSW ADT 11; Judicial Member Robinson in *Mullett v Department of Education and Training* [2001] NSW ADT 119).

Costs

The power to award costs applies only if justified by special circumstances in the conduct of proceedings before the Tribunal. The usual rule is that costs are not to be awarded. This has at least two objectives — one to remove an impediment to an exercise of important rights that the Tribunal has been established to see protected where appropriate; two to discourage the use of lawyers. In these ways the goals of affordable accessible justice are seen as supported. (Appeal Panel in *Charteris v Leichhardt Municipal Council* [2001] NSW ADTAP 12).

Costs are costs incurred by a party for professional legal services. Costs of proceedings mean costs of proceedings before the Tribunal not any costs incurred prior to the proceedings. The costs power should not be used as a sanction to punish agencies for poor administration. (President O'Connor in *Raethel v Department of Education and Training* [2000] NSW ADT 56).

Tribunal powers to impose conditions regarding released documents

The Tribunal in exercising powers and discretions in ss.24 and 25 does not have power to impose conditions on the release of an agency's documents. While such a power exists in s.85 of the *ADT Act* such powers are subject to express or implied contrary provisions in the *FoI Act.* As there is no such power in the *FoI Act* the Tribunal in this case does not have powers under s.85 to impose conditions on the release of documents. *(Judicial Member Robinson in Humane Society v EPWS* [2001] NSW ADT 133).

Tribunal's override discretion

The Tribunal in conducting a review has the same powers under s.25(1) to exercise a discretion regarding the disclosure of an otherwise exempt document as the original decision maker. The Tribunal's function under s.63(1) of the *ADT Act* is to decide what the correct and preferable decision is having regard to the material then before it including ... any applicable law. This requires the Tribunal to address the merits of the decision made by the primary decision maker under s.25(1) by reference to the same legal parameters as applied to the original decision.

The override discretion should only be exercised where there is something about the information itself or the surrounding circumstances which bearing in mind the objects of the *FoI Act* and the rationale for any exemption which has been satisfied persuades the decision maker that the exemption should not be claimed. The touchstone is whether withholding the document is reasonably necessary for the proper administration of the government (s.5(2)(b)). The Tribunal is not constrained by s.124 of the *ADT Act* as in reviewing an FoI decision it is acting on powers conferred on it by the *FoI Act*. (Judicial Member Smith in *Mangoplah v Great Southern Energy* [1999] NSWADT 93); (Appeal Panel in *SAS Trustee v Daykin* [2001] NSW ADTAP 20).

Powers of review where no document exists

The Tribunal's jurisdiction to review a refusal extends to examining a decision that no documents of the kind requested have been found to exist. Such a determination under s.24 is reviewable by the Tribunal which can determine whether an agency is correctly asserting that it does not hold a document. (Judicial Member Smith in *Beesley v Commissioner of Police* [2000] NSW ADT 52)

Tribunal powers regarding restricted documents

Despite s.57(4) which appears to limit the review jurisdiction of the Tribunal to the consideration of whether there are reasonable grounds for a claimed exemption under Clauses 1, 2 and 4 (restricted documents), s.124 of the *ADT Act* empowers the Tribunal to satisfy itself not just that a reasonable person could reach such a conclusion but also that the Tribunal itself was satisfied that grounds existed for the exemption claim based on the material before it.

The Tribunal will only be limited in its consideration of matters under s.57 if there has been a separate invocation of s.57 by the applicant. (Deputy President Hennessy *Kennedy v Commissioner of Police* [2001] NSW ADT 39)

In the normal course of reviewing a decision under the *FoI Act*, s.63 of the *ADT Act* empowers the Tribunal to review the decision of the agency to refuse access to an exempt document. (Judicial Member Smith in *Mangoplah v Great Southern Energy* [1999] NSW ADT 93).

The Tribunal has continued to take this position despite arguments by the Crown Solicitor that it has limited powers under s.57 in considering whether it can require the disclosure of a document it finds exempt under Clauses 1, 2 and 4. (restricted documents). (See also *Rittau v Police, Watkins v RTA,* and *Vranic v Department of Community Services* [2001] NSW ADT 129).

Status of individual tribunal decisions

> The Tribunal is not bound by precedent in the strict sense in relation to being formally bound by earlier decisions of the Tribunal. However for a number of reasons I consider the Tribunal should ordinarily follow decisions of the Appeal Panel and decisions of the Tribunal as constituted by the President or the Deputy Presidents. These decisions should be followed because they are authoritative and go some way to ensuring consistency in the Tribunal's decision making ... The Tribunal should only refuse to follow such decisions if it concludes the previous decision is clearly wrong.
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> Judicial Member Robinson in *Rittau v Commissioner of Police* [2000] NSW ADT 186

Extension of time for lodging applications to ADT

Section 54 of the *FoI Act* requires an application for review to be lodged with the ADT within 60 days. Although s.44 of the *ADT Act* allows the Tribunal to extend time for a late application, s.40 of that Act provides that such a provision only applies subject to any contrary provision in another enactment. As the *FoI Act* makes no provision for extension of time for lodgement of a late application, the ADT has no power to consider a late application. (Deputy President Hennessy in *Black v Bathurst City Council* [2001] NSW ADT 139)

ADT appeal panel jurisdiction to consider merits review

Section 113 of the *ADT Act* provides for an application for appeal of Tribunal decisions. However such an appeal must first be brought on a question of law. If an appeal is brought on a question of law the Appeal Panel has power under s.113(2)(b) to extend the appeal to a review of the merits if it grants leave to the applicant. In effect the Tribunal must find an error of law before it can review the merits of the decision. It would not be proper to embark on a consideration of the merits where no error of law have been established. (Appeal Panel in *Cerminara v NSW Police* [2001] NSW ADTAP 32).

Conclusion

The NSW District Court which conducted FoI merits review in the decade 1989-1999 did not make much of a contribution to FoI jurisprudence in Australia. The ADT, in a relatively short space of time is making a mark. President O'Connor and Deputy President Hennessy have delivered most of the decisions on FoI applications and have been well supported by Judicial Member Robinson. A relatively new member Judicial Member Britton has also made a number of well reasoned decisions. There has been the occasional decision which does not stand up to close scrutiny. Another article on the 'not so leading cases' will follow later in the year.

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