ADT decision

The ADT affirmed the agency's decision except in relation to the document identified as 'Document 4'.

In relation to document 4, from the Department, it required the following statement to be attached to the two claims in issue:

> These comments represent merely the perceptions held by the author as to the conduct of the applicant in the particular circumstances at that time and have no greater significance. This notation has been added at the direction of the Administrative Decisions Tribunal.

The ADT added: 'The notation should then go on to refer to this decision and where it can be read'.

In relation to the documents of the Minister's office, its decisions were affirmed.

Should something ever arise in the future, will the Department ever tell the Minister's office of the ADT's decision?

[P.W.]

FORTHCOMING REPORTS OF NSW ADT DECISIONS

The February issue of *FoI Review* will cover four recent ADT decisions, held over for space reasons. Two of these are:

Stephanie Raethel v Director General, Department of Education and Training [1999] NSWADT 108.

The application deals with access to HSC results held by the Department of Education.

- *Mangoplah Pastoral Co Pty Ltd v Great Southern Energy* [1999] NSWADT 93.

The application deals with the legal professional privilege exemption.

VICTORIAN FoI DECISIONS

AAT/VCAT

ELSING and DEPARTMENT OF JUSTICE (No. 1998/00937)

Decid d: 3 December 1998 by Deputy President Galvin.

Section 30 (internal working documents) — Section 31 (law enforcement documents) — Section 33 (personal affairs) — Section 38 (secrecy provision) — Section 50(4) (public interest override).

Procedural history

Elsing sought access to information contained in his prison files and in certain computer records. Several documents were either wholly or partially released to him. At the hearing, six documents remained in dispute.

The decision

The Tribunal ordered the release of factual information at the top of one document and otherwise affirmed the respondent Department of Justice's decision.

The reasons for the decision

Section 30

The Tribunal accepted that two of the documents in dispute consisted of opinion, advice and recommendations from a Departmental officer in the course of and for the purposes of the placement of prisoners within the prison system. The Tribunal noted that the expression 'deliberative processes' in s.30(1) was wide enough to embrace the placement of prisoners within the prison system.

The Tribunal noted that the purpose of s.30(1) is to enable an open and frank exchange of opinions and ideas among officers and relevant Ministers in the process of deliberation and policy making. It also noted that, in the present case, to be balanced against that was the public interest in the proper administration of the Corrections Service. The Tribunal also observed that there is an on-going public interest in the appropriate punishment of people convicted of criminal offences.

The Tribunal concluded that it would be contrary to the public interest to disclose the information in the documents in question (with the exception of the purely factual material that was properly severable) on the basis that such disclosure would have a detrimental impact on the maintenance of open and frank exchange of views and ideas within the Department of Justice.

Section 31(1)

The Tribunal held that most of the documents that recorded specific and identifiable instances of aspects of administration of the prison system were exempt under s.31(1)(a) of the Act. It accepted that there was a real rather than a fanciful or remote chance of prejudice to the administration of the law in this particular case if those documents were released. (See the Comment below.) Such prejudice would flow because disclosure would adversely impact on the exchange of information amongst senior corrections staff.

The Tribunal also found, however, that information that appeared to relate to an alleged fact which presumably would already be within Elsing's knowledge was not exempt under s.31(1)(a).

The Tribunal found that some of the documents were exempt under s.31(1)(e) of the Act on the basis that their release would or would be reasonably likely to endanger the lives or physical safety of persons engaged in or in connection with law enforcement.

Section 33(1)

The Tribunal accepted that much of the information contained in the documents related to incidents that constituted the personal affairs of prisoners held in the prison system. It noted that information relating to prison staff was not personal but related to their employment. Nevertheless, that information could not be meaningfully edited from the information relating to the prisoners' personal affairs.

The Tribunal found that it would be unreasonable to disclose the information relating to the personal affairs of the prisoners, particularly having regard to the fact that protecting such information is critical to prison security and prisoner management.

Section 38

The Tribunal accepted that a number of the documents fell within s.30 of the *Corrections Act 1986*. The Tribunal assumed, without stating, that

that secrecy provision was specific enough for the purposes of s.38 of the Act. Accordingly, it found that the documents were exempt under that section.

Section 50(4)

The Tribunal held that the public interest did not require the release of the documents in dispute. It noted that disclosure of those documents, whilst having potential adverse consequences, would not significantly contribute to public accountability.

Comment

The precise meaning of the phrase 'in a particular instance' in s.31(1)(a) of the Act is not free from doubt. It is unclear whether the phrase should be interpreted as requiring the identification of a particular *area, facet or aspect* of the administration of the law, or whether it should be interpreted as requiring the identification of a single specific *case or instance* of such administration.

In this case, the Tribunal implicitly favoured the former approach because it found that the administration of the prison system — which is an area, facet or aspect of the administration of the law — was a particular instance for the purposes of s.31(1)(a). This conclusion is consistent with the decision in *Re Clarkson and Department of Premier and Cabinet* (unreported, the AAT, Judge Duggan P, 29 March 1990) at 18-19.

[J.D.P.]

WOODFORD and DEPARTMENT OF HUMAN SERVICES (No. 1998/23696)

Decided: 24 November 1998 by Presiding Member Davis.

Section 39 (amendment of personal records) — Section 55 (onus of proof).

Factual background

On 21 March 1997, the respondent Department of Human Services (DHS) released certain documents to Woodford pursuant to a request made by her under the Act. Amongst these documents was a file note taken by a former officer of the DHS. The file note recorded that Woodford spoke to the officer on three occasions on 29 April 1994, and that she used foul language during those conversations. Woodford maintained that she only spoke to the officer twice and that she did not use any foul language.

Procedural history

Woodford requested the DHS to amend the file note pursuant to s.39 of the Act. The DHS refused to do so but agreed to put a memorandum attached to the file note recording Woodford's version of events. Woodford was not satisfied with this course of action and applied to the Tribunal for a review of the DHS's decision to refuse to amend the file note.

The decision

The Tribunal affirmed the DHS's decision.

The reasons for the decision

The Tribunal held that the parts of the file note that recorded that Woodford used foul language related to her personal affairs. After examining the evidence, the Tribunal concluded that the contents of the file note were a true and correct representation of three telephone conversations that took place on 29 April 1994 between Woodford and the DHS officer. Accordingly, the Tribunal affirmed the DHS's decision.

Having reached this conclusion, the Tribunal did not find it necessary to decide the 'difficult but interesting point' as to who bears the onus of proof in relation to an application for review of a decision not to amend a record pursuant to a request made under s.39 of the Act. Compare *Re Atkins and Victoria Police (1999)* 82 *FoI Review* 64, where it was held that the applicant bore the onus of proof in such cases.

[J.D.P.]

FEDERAL FoI DECISIONS

Administrative Appeals Tribunal

These FoI decision summaries are produced by Corrs Chambers Westgarth, Canberra (Corrs), and are for the information, guidance and assistance of officers who are actively involved in the day-to-day administration of FoI legislation within their particular agencies. They are not produced, and are not intended, for the purpose of giving legal advice either generally or in a particular context. No person should rely on any summary as constituting legal advice to apply in particular circumstances but should, instead, obtain independent legal advice. Copyright in every decision summary remains with Corrs Chambers Westgarth.

[N.D.]

PEAKE and RESERVE BANK OF AUSTRALIA (No. V96/363)

Decided: 24 June 1997 by Deputy President McDonald; Members D. Elsum and C. Woodard.

FoI Act: *Sections 7(2); 43(1)(b); 43(1)(c); Schedule 2 Part II.*

Reserve Bank Act: Part V
Documents relating to Reserve Bank's commercial business in marketing of numismatics products; business affairs of numismatics dealers.

D cision

The decision under review was affirmed by the AAT except insofar as the respondent Reserve Bank was not entitled to rely on exemptions claimed under the provisions of s.7(2) and Schedule 2 Part II.

Facts and background

Peake is a bank note collector.

The Reserve Bank, in addition to being the banker and financial agent of the Commonwealth also carries on a commercial numismatic business. The Bank sells it numismatic products predominantly to numismatic dealers but also sells a small proportion of such products directly to individual collectors (of whom Peake is one).

Peake requested information and access to nominated documents arising from the period covering 1988 to 1995.