

FEDERAL COURT OF AUSTRALIA

Attorney-General v Honourable Mark Dreyfus [2016] FCAFC 119

Appeal from: *Mark Dreyfus v Attorney-General (Commonwealth of Australia)* [2015] AATA 995

File number: NSD 100 of 2016

Judges: **BESANKO, ROBERTSON AND GRIFFITHS JJ**

Date of judgment: 6 September 2016

Catchwords: **ADMINISTRATIVE LAW** – appeal on a question of law from a decision of the Administrative Appeals Tribunal – Freedom of Information request – request for access to electronic diary of the Attorney-General in a “weekly agenda” format for the period 18 September 2013 to 12 May 2014 – whether any error of law in the Tribunal concluding that the Attorney-General had not discharged his onus of establishing that the primary decision was justified or that the Tribunal should give a decision adverse to the applicant such that (i) the Tribunal was not satisfied that a practical refusal reason existed in relation to the request and (ii) the Tribunal decided that the work involved in processing the request would not substantially and unreasonably interfere with the performance of the Attorney-General’s functions – **Held:** Appeal dismissed.

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth), s 44
Freedom of Information Act 1982 (Cth), ss 3, 4, 11A(5), 22, 24, 24AA, 27, 27(1)(b), 27A, 27A(1)(b), 37(1)(c), 47, 47F, 47G, 47G(1), 61, 61(1)(b)
Privacy Act 1988 (Cth)

Cases cited: *Re Chandra and Department of Immigration and Ethnic Affairs* [1984] AATA 437; 6 ALN N257
Wiseman v The Commonwealth [1989] FCA 434

Date of hearing: 12 August 2016

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 71

Counsel for the Applicant: Mr J Pizer QC with Mr A Dinelli

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: The Respondent appeared in person with Mr L Corbett and Mr C Parkin

Solicitor for the Respondent: Maurice Blackburn Pty Ltd

ORDERS

NSD 100 of 2016

On Appeal from the Administrative Appeals Tribunal

BETWEEN: **ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA**
Applicant

AND: **THE HONOURABLE MARK DREYFUS MP**
Respondent

JUDGES: **BESANKO, ROBERTSON AND GRIFFITHS JJ**

DATE OF ORDER: **6 SEPTEMBER 2016**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The applicant pay the respondent's costs, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 This is an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) on a question of law from a decision of the Administrative Appeals Tribunal (the **Tribunal**) given on 22 December 2015 as follows:

1. The decision communicated to the applicant by letter dated 13 June 2014 that a practical refusal reason exists because the work involved in processing the request(s) in accordance with the *Freedom of Information Act 1982* (Cth) (the **Act**) would substantially and unreasonably interfere with the performance of the Attorney-General's functions be set aside.
2. In lieu thereof it be decided that no practical refusal reason exists under s 24 of the Act in relation to the request(s).

2 As recorded by the Tribunal at [2], the requests (two in number) under the *Freedom of Information Act 1982* (Cth) (the **FOI Act**) were identified as a single request for access to the Attorney-General's diary in a "weekly agenda" format for the period 18 September 2013 to 12 May 2014. The Tribunal found, at [28], that the diary could be produced in a "weekly agenda" format because it was an electronic document created using Microsoft Outlook software.

3 The effect of the Tribunal's decision is that the global claim by the Attorney-General that a practical refusal reason existed under ss 24 and 24AA of the *FOI Act* was set aside and the primary decision-maker was required to process the request for access under the *FOI Act* by reference to the particular entries in the Attorney-General's diary.

The statutory provisions

4 The general objects of the *FOI Act* were set out in s 3. The primary objects were stated (relevantly) as to give the Australian community access to information held by the Government of the Commonwealth by:

- (a) requiring agencies to publish the information; and
- (b) providing for a right of access to documents.

5 Having regard to the particular requests for access to the Attorney-General's diary, it is relevant to note the following definition in s 4:

official document of a Minister or **official document of the Minister** means a document that is in the possession of a Minister, or that is in the possession of the Minister concerned, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency.

6 The definition of “exempt document” in s 4 was:

exempt document means:

- (a) a document that is exempt for the purposes of Part IV (exempt documents) (see section 31B); or
- (b) a document in respect of which, by virtue of section 7, an agency, person or body is exempt from the operation of this Act; or
- (c) an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State.

7 Section 24 of the *FOI Act* was in the following terms:

24 Power to refuse request—diversion of resources etc.

- (1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:
 - (a) must undertake a request consultation process (see section 24AB); and
 - (b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists—the agency or Minister may refuse to give access to the document in accordance with the request.
- (2) For the purposes of this section, the agency or Minister may treat 2 or more requests as a single request if the agency or Minister is satisfied that:
 - (a) the requests relate to the same document or documents; or
 - (b) the requests relate to documents, the subject matter of which is substantially the same.

8 Section 24AA of the *FOI Act* was as follows:

24AA When does a *practical refusal reason* exist?

- (1) For the purposes of section 24, a ***practical refusal reason*** exists in relation to a request for a document if either (or both) of the following applies:
 - (a) the work involved in processing the request:
 - (i) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or

- (ii) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister’s functions;
 - (b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).
- (2) Subject to subsection (3), but without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister must have regard to the resources that would have to be used for the following:
- (a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;
 - (b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:
 - (i) examining the document; or
 - (ii) consulting with any person or body in relation to the request;
 - (c) making a copy, or an edited copy, of the document;
 - (d) notifying any interim or final decision on the request.
- (3) In deciding whether a practical refusal reason exists, an agency or Minister must not have regard to:
- (a) any reasons that the applicant gives for requesting access; or
 - (b) the agency’s or Minister’s belief as to what the applicant’s reasons are for requesting access; or
 - (c) any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind.

9 The *FOI Act* contained several provisions relating to business documents, including provisions relating to consultation in respect of that category of documents, as well as when a document was conditionally exempt under either s 47 (trade secrets or commercially valuable information) or s 47G (business documents).

10 Section 27 relevantly provided:

27 Consultation—business documents

Scope

- (1) This section applies if:
 - (a) a request is made to an agency or Minister for access to a document containing information (*business information*) covered by subsection (2) in respect of a person, organisation or undertaking; and
 - (b) it appears to the agency or Minister that the person, organisation or proprietor of the undertaking (the *person or organisation concerned*)

might reasonably wish to make a contention (the *exemption contention*) that:

- (i) the document is exempt under section 47 (trade secrets etc.); or
- (ii) the document is conditionally exempt under section 47G (business information) and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (2) This subsection covers the following information:
 - (a) in relation to a person—information about the person’s business or professional affairs;
 - (b) in relation to an organisation or undertaking—information about the business, commercial or financial affairs of the organisation or undertaking.
- (3) In determining, for the purposes of paragraph (1)(b), whether the person or organisation concerned might reasonably wish to make an exemption contention because of business information in a document, the agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person, organisation or undertaking is known to be associated with the matters dealt with in the information;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

...

11 It is not necessary to set out the terms of s 47, however, it is relevant to note that s 47G relevantly provided:

47G Public interest conditional exemptions – business

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
 - (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or

of a Territory or the administration of matters administered by an agency.

- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.
- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

12 The *FOI Act* contained substantially similar provisions in respect of documents containing personal information. "Personal information" was defined in s 4 as having the same meaning as in the *Privacy Act 1988* (Cth). Section 27A provided for consultation in respect of documents affecting personal privacy. It provided:

27A Consultation—documents affecting personal privacy

Scope

- (1) This section applies if:
 - (a) a request is made to an agency or Minister for access to a document containing personal information about a person (including a person who has died); and
 - (b) it appears to the agency or Minister that the person or the person's legal personal representative (the *person concerned*) might reasonably wish to make a contention (the *exemption contention*) that:
 - (i) the document is conditionally exempt under section 47F; and
 - (ii) access to the document would, on balance, be contrary to the

public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (2) In determining, for the purposes of paragraph (1)(b), whether the person concerned might reasonably wish to make an exemption contention because of personal information in a document, the agency or Minister must have regard to the following matters:
- (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

Opportunity to make submissions

- (3) The agency or Minister must not decide to give the applicant access to the document unless:
- (a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
 - (b) the agency or the Minister has regard to any submissions so made.
- (4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

Decision to give access

- (5) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:
- (a) the person concerned;
 - (b) the applicant.

Access not to be given until review or appeal opportunities have run out

- (6) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have **run out**, see subsection 4(1).

Notice and stay of decision not to apply unless submission made in support of exemption contention

- (7) Subsections (5) and (6) do not apply unless the person concerned makes a submission in support of the exemption contention as allowed under paragraph (3)(a).

Edited copies and personal information

- (8) This section applies:
- (a) in relation to an edited copy of a document—in the same way as it applies to the document; and
 - (b) in relation to a document containing personal information—to the extent to which the document contains such information.

13 Section 47F dealt with the public interest conditional exemption relating to personal privacy. It provided:

47F Public interest conditional exemptions – personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
- (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

- (4) Subsection (5) applies if:
- (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
 - (b) it appears to the principal officer of the agency or to the Minister (as

the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.

- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
- (a) carries on the same occupation, of a kind mentioned in the definition of *qualified person* in subsection (7), as the first-mentioned qualified person; and
 - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

14 Section 61 relevantly provided:

61 Onus

- (1) In proceedings under this Part for review of a decision in relation to a request...:
- (a) ...; or
 - (b) if the applicant in relation to the request or the personal records application applied for the review—the agency to which, or the Minister to whom, the request or personal records application was made has the onus of establishing that the decision is justified, or that the Tribunal should give a decision adverse to the applicant.

The Tribunal's findings and reasoning summarised

15 The Tribunal considered that the Attorney-General had not discharged the onus under s 61(1)(b) of the *FOI Act* of establishing that the primary decision was justified or that the

Tribunal should give a decision adverse to the applicant. Accordingly, the Tribunal set aside the decision of the Attorney-General's delegate that a practical refusal reason existed in relation to the requests.

16 The Tribunal made the following findings of fact, standing, as it was, in the shoes of the primary decision-maker.

17 At [53], the Tribunal found that the diary extracts in evidence (in a confidential exhibit) consisted, in the main, of a series of brief and anodyne entries relating to appointments and work arrangements of the Attorney-General then more than 18 months old. The entries in the diary merely described who was to be met, not the contents of the meeting, and were essentially historical.

18 At [25], the Tribunal found that Mr Paul O'Sullivan, the Attorney-General's Chief of Staff, who gave evidence by affidavit for the Attorney-General, held the only delegation from the Attorney-General to determine Freedom of Information applications requesting access to documents of the Attorney-General. Mr O'Sullivan made the decision that a practical refusal reason existed in relation to the processing of the request(s).

19 At [29], the Tribunal found that insofar as Mr O'Sullivan considered that the diary to which access was sought included documents other than the Outlook calendar, he was acting on the basis of the original application which had been overtaken by the then applicant's clarification of what was sought. The current position was that the applicant did not seek any invitations, correspondence, or background or briefing documents which might be attached to or otherwise kept in the Outlook calendar. All that was sought was access to the Outlook calendar in a weekly format (that is, a view showing a week to a page) for the periods indicated.

20 At [30], the Tribunal found that, from material tendered in the confidential exhibit (i.e. six weeks of extracts from the diary in a daily format, it being common ground that the weekly format will show no more than the daily format), it was apparent that the "weekly agenda" format showed only the date, time and certain limited meeting or appointment details, such as the identity of the person(s) involved in the meeting or appointment and, in some cases, brief (one or two words) descriptions of the nature or purpose of the meeting. It also showed times and general modes of travel and booking references. It did not show any related invitations,

correspondence, or background or briefing documents. These facts, the Tribunal said, were fundamental to the Tribunal's assessment.

21 At [32], the Tribunal set out some basic facts:

- The Attorney-General worked six and sometimes seven days a week.
- He had, on average, about 12 appointments a day.
- The diary contained all of his appointments – in his capacity as a Minister, in his capacity as a senior member of the Liberal/National Coalition, and in his personal capacity (although, the Tribunal noted, that the extracts from the diary in the confidential exhibit did not appear to contain personal appointments).
- The Office of the Attorney-General had 17 staff (10 Ministerial and four electorate staff, supported by three liaison officers from the Attorney-General's Department). The Department was much larger (perhaps about 1300 people).
- Although Mr O'Sullivan alone was authorised to make decisions about requests of the Attorney-General under the *FOI Act*, others conducted the underlying work and presented Mr O'Sullivan with a draft decision. If satisfied, Mr O'Sullivan decided in accordance with the draft decision. If not satisfied, Mr O'Sullivan undertook further work or required it to be undertaken and might also consult the Attorney-General in "difficult or sensitive cases".
- The request related to 237 days which involved about 1930 individual entries in the diary. The Tribunal's inspection of the diary extracts disclosed that most entries were brief, one line, entries.
- It would not be difficult or take much time to prepare and print the diary over the requested period in the "weekly agenda" format.

22 As to the claimed security risks in disclosing Ministerial movements or travel arrangements, at [35] the Tribunal was not satisfied that Mr O'Sullivan's concern was based on the actual contents of the diary to which access was sought. His concern appeared to operate at a more general level that these request(s) might set a precedent for disclosure of current and proposed appointments of the Attorney-General. The Tribunal did not consider request(s) for diary extracts more than 18 months old to set a precedent for any request for access to records of current and future appointments. At [36], the Tribunal said that the diary extracts did not give support to Mr O'Sullivan's concern that the request(s), if processed, might involve some

disclosure of a pattern of behaviour. At [37], the Tribunal said that the two most important facts in this respect were, first, that it would be relatively straightforward for a decision to be made about which classes of documents, if any, engaged the provision exempting documents which would or could reasonably be expected to endanger the life or physical safety of any person (s 37(1)(c) of the *FOI Act*). Second, that decision having been made, the offending information could readily be deleted and the balance of the document produced pursuant to s 22. The Tribunal said that it did not consider that there would be a great deal of work involved in this task given that the contents of the diary in Outlook could be exported into a Microsoft Word format which would allow electronic searches. At [38], the Tribunal reached similar conclusions about Mr O’Sullivan’s concerns in respect of security-related meetings. It seemed to the Tribunal that the issues being raised were based on perceptions pitched at a high level of generality and without regard to the actual contents of the Attorney-General’s diary when produced in weekly format as disclosed by the extracts in the confidential exhibit.

23 At [40], the Tribunal accepted that the Attorney-General would meet from time to time with representatives of business and individuals. The Tribunal was unable to accept the approach that if nothing more than the name of the business representative or individual appeared in the diary, it would nevertheless be necessary in every case to go behind the entry and examine associated documents and undertake a complex process of working out whether, by the disclosure of some pattern or mosaic, the disclosure of the information might unreasonably disclose personal or business information of the relevant kind such as to require consultation with the person concerned. The Tribunal said it was unable to accept that that approach was contemplated by the *FOI Act*. At [41], given that the diary in “weekly agenda” format was nothing more than a list of meetings with, perhaps, a short description of the purpose of the meeting, the Tribunal said it had considerable difficulty accepting the proposition that disclosure of such information would, or could reasonably be expected to, **unreasonably** affect such a person adversely in respect of his or her lawful business or professional affairs or could **reasonably** be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency (etc.), which were the pre-conditions to exemption under s 47G(1). This was particularly so given that the diary related to events at least 18 months old. (Original emphasis).

24 At [42], the Tribunal said the test was not whether it appeared that a person might wish to make an exemption contention. Rather, it was that it appeared a person might **reasonably** wish to make an exemption contention. In other words, there must be some rational basis

which the agency or Minister can discern indicating that disclosure of the document would, or could be expected to, **unreasonably** affect such a person adversely in respect of his or her lawful business or professional affairs (etc). (Original emphasis.)

25 At [43], the Tribunal said that whether or not disclosure would be “unreasonable” was a question of fact and degree which called for a balancing of all the legitimate interests involved (citing, in support, *Wiseman v The Commonwealth* [1989] FCA 434 (**Wiseman**)), which included the legitimate interest in knowing with whom Ministers were meeting. In *Wiseman* at [5] the Full Court referred to *Re Chandra and Department of Immigration and Ethnic Affairs* [1984] AATA 437; 6 ALN N257 (at 259).

26 At [44], the Tribunal found that where there was nothing more than an entry in the diary of a name or names of a business representative (and the business name) who might have met with the Attorney-General some 18 months or more ago (recognising that the mere fact that a meeting was scheduled did not mean it took place), it was unable to discern a rational basis upon which it could appear in every such case that the person(s) concerned might **reasonably** wish to make an exemption contention. (Original emphasis). The Tribunal did not accept that it was necessary to go behind the face of such an entry in order to try to find if there was any reason which might ground the appearance of such a reason. If it did not appear from the face of the entry (which was all that would be disclosed) or from anything else actually known to the decision-maker (even if not apparent from the face of the diary entry) that a person might reasonably wish to make an exemption contention, then that was the end of the matter. In the Tribunal’s view, there was no requirement to do more, in effect, by trying to discover something which might amount to a rational foundation for it appearing that a person might reasonably wish to make an exemption contention.

27 It followed that, at [45], the Tribunal did not accept the suggestion that for every meeting with a business representative there would need to be a lengthy process of considering whether the person must be given the opportunity to make an exemption contention as contemplated by s 27 of the *FOI Act*. The Tribunal considered that the qualification on the wish of a person to make an exemption contention (i.e. that it appeared to the decision-maker that the wish be **reasonable**) cast an obligation on the agency or Minister concerned to assess whether, in the circumstances of each particular case, there was some rational basis either apparent from the face of the document to which access was sought or otherwise known to the decision-maker upon which the person involved could reasonably seek to rely upon the

actual terms of the exemption (in distinction from, for example, a mere preference or even a strong preference, for the fact of their meeting with the Attorney-General not being disclosed). The Tribunal did not accept that, otherwise, the decision-maker was obliged to make inquiries or search for some basis upon which it might appear that a person might reasonably wish to make an exemption contention.

28 At [46], the Tribunal said that there was no need to consult a person in order to decide whether the *FOI Act* made it necessary to consult that person. Consultation was only required once the relevant appearance of a reasonable wish to make an exemption contention arose. There was no obligation on the decision-maker to search for things not apparent from the face of the document to which access is sought or not known to the decision-maker.

29 With specific reference to the business affairs exemption, the Tribunal said at [47]-[48]:

47. Accordingly, in the present case, insofar as it can be anticipated that there is a class of entries in the diary in which a representative of a business has been scheduled to meet the Attorney-General within the period of the request and the diary entry contains nothing but the name(s) of the person(s) involved and the business name I do not accept that such entries in the ordinary course will require extensive consideration and consultation under s 27.

48. I accept that there might be another class of entries in the diary where more than the name(s) of the person(s) involved and the business name are disclosed or there is some reason which makes the entry particularly sensitive, although I saw no obvious examples of such in the diary extracts. Given this, I consider that such entries will be rare. It is possible but by no means certain that in such a case further consideration or even consultation under s 27 might be required because the view might be reached that such a person might reasonably wish to make an exemption contention.

30 At [49], the Tribunal said that a similar position applied to the personal privacy exemption. The Tribunal said the mere appearance of a person's name in the diary was insufficient for it to be apparent on the face of the document that a person might reasonably wish to make an exemption contention. Where, however, something more was disclosed such as the purpose of the meeting or there was some known sensitivity the Tribunal accepted that further consideration or even consultation under s 27A might be required because the view might be reached that such a person might reasonably wish to make an exemption contention. Again, however, the Tribunal's review of the diary extracts indicated that this would be a rare case.

31 For these reasons the Tribunal did not accept, at [51], Mr O'Sullivan's estimate that some 263 people would need to be consulted if the requests were to be processed. This estimate appeared to assume that every named individual who was not a Ministerial advisor or media

representative would need to be consulted, an assumption which the Tribunal did not accept. It followed that the estimate of between 130 and 526 hours for consulting third parties had been calculated on an incorrect basis. It had not been proved that anything like 130 to 526 hours might be involved. Any consultation required would be very many orders of magnitude less than that proposed.

32 By way of reiteration, the Tribunal said at [52]:

52. Because it is fundamental to the proper administration of the FOI Act, I should reiterate my view that I consider that it would be wrong to approach the required task on the basis that: (i) some people might be sensitive to or concerned about the fact that they have met a Minister in the Minister's official capacity or that such people might prefer, even strongly prefer, that the fact of their meeting not be disclosed; or (ii) the decision-maker is subject to some obligation to search for material not known or otherwise apparent from the face of the document to which access is sought to try to find some basis for it to appear that a person might reasonably wish to make an exemption contention. There is no foundation in the FOI Act to perform the functions which it requires with a view to such sensitivities. To administer the FOI Act on some other basis would work against the intention of the Parliament. It would elevate personal sensitivities which on a rational view could not involve an unreasonable disclosure of personal information about any person into something that an agency or Minister would have to assess, thereby running the risk (as in the present case) that the agency or Minister perceives that an extraordinary amount of time and effort would be involved in processing the FOI request. By such means, if permitted, the intentions of the Parliament as identified in s 3 would be thwarted.

33 At [54], the Tribunal took a similar view about the other exemptions mentioned in Mr O'Sullivan's evidence. One example was Cabinet documents.

34 As the Attorney-General's focus in the present appeal was on [64]-[65] of the Tribunal's reasons, we set them out in full, noting that the Tribunal was there dealing with part of the definition of "exempt document", being the part that deals with an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department, for example party political meetings. The Tribunal said:

64. Otherwise I do not consider that there is much of an issue about this part of the definition of exempt document. I accept that someone, properly informed about the Attorney-General's activities and instructed about the FOI Act, will have to look at every entry. I do not accept, however, that where it is merely possible that a meeting might have traversed issues other than those relating to the affairs of an agency or of a Department of State it is necessary or even appropriate to attempt to work out what was discussed at the meeting. It can reasonably be inferred that many meetings with other Ministers might involve both the affairs of an agency or of a Department of State and other matters such as party political matters. For present purposes, however, the important fact is that all that is required to be produced is the diary which records, in

most cases disclosed by the extracts, the mere fact of a meeting and who it was with. Given this, the exemption is not attracted. The diary entry remains an entry relating to the affairs of an agency or of a Department of State even if the actual meeting related to such matters and other matters. In any event, the notion that the Attorney-General or other Ministers might now need to be consulted to see if they can try to remember whether they might have discussed something other than the affairs of an agency or of a Department of State at a meeting more than 18 months ago, as was suggested, is impractical and contrary to the express intent of the Parliament about how the FOI Act should be applied. That said, I accept that there may be some few entries (not apparent to me from the diary extracts) where there might be some suggestion on the face of the entry that the meeting related to something other than the affairs of an agency or of a Department of State and, if there are related notes, it might be appropriate to examine the notes to ascertain whether the entry even if only in part related to the affairs of an agency or of a Department of State.

65. It will be apparent that I consider the approach that has been taken to the request(s), other than in the one respect set out in the paragraph above, is largely based on a view of the requirements of the FOI Act with which I am unable to agree and, importantly, consider would work against the objects of that Act. That approach has resulted in a substantial overestimate of the work and consultation that will be required to ensure compliance with the FOI Act. That said, I accept that a person with knowledge about the operations of the Office of the Attorney-General will need to undertake a review of each and every entry. With such knowledge I consider that it is likely that for numerous entries a glance or two will suffice. For some (albeit, in my view, a small number of) others, however, I accept that a more detailed consideration may be required. For some entries (but in my view very few cases) I accept that a decision to consult might be taken.

The Notice of Appeal

35 The notice of appeal is in the following terms (without alteration):

Questions of law

1. A decision-maker may refuse to process an FOI request if a “practical refusal reason” exists (s 24 of the FOI Act). Such a reason exists if the work involved in processing the request would substantially and unreasonably divert an agency’s resources from its other operations or would substantially and unreasonably interfere with the performance of a Minister’s functions (s 24AA(1)(a)). In deciding whether a ‘practical refusal reason’ exists, the decision-maker must have regard to the resources that would have to be used for (amongst other things) performing the function of deciding whether to grant, refuse or defer access to the document(s) to which the FOI request relates (s 24AA(2)(b)).

In calculating the resources required to perform that function, is the decision-maker necessarily confined to considering the resources required to:

- (a) examine the face of the document(s) requested; and
- (b) consult with any person or body in relation to the request –
unless there is some suggestion on the face of the document(s) that it is

appropriate to look at other documents?

2. The requirement to consult a third-party under ss 27 and 27A of the FOI Act relevantly arises where it is apparent to the decision-maker that the third party might reasonably wish to contend that the document(s) requested are exempt under the business or personal affairs exemption, and that access to the document(s) would, on balance, be contrary to the public interest (**an exemption contention**).

In considering whether it appears to the decision-maker that a third party might reasonably wish to make an exemption contention in respect of a document, is the decision-maker necessarily confined to considering the face of the document and what the decision-maker already knows, or is it sufficient that there be some prospect that the decision-maker might accept the exemption contention?

Grounds relied on

As to Question 1:

1. The Tribunal erred in law in concluding that, in calculating the resources required to perform the function of deciding whether to grant, refuse or defer access to the document(s) to which the FOI request relates, the decision-maker is necessarily confined to considering the resources required to:
 - (a) examine the face of the document(s) requested; and
 - (b) consult with any person or body in relation to the request –unless there is some suggestion on the face of the document(s) that it is appropriate to look at other documents.
2. The Tribunal erred in law in failing to conclude that, in calculating the resources required to perform that function, the decision-maker may consider the resources required to look at other documents to determine whether access to the document(s) requested should be granted, refused or deferred.

As to Question 2:

3. The Tribunal erred in law in concluding that, in considering whether it appears to the decision-maker that a third party might reasonably wish to make an exemption contention in respect of a document, the decision-maker is necessary confined to considering the face of the document and what the decision-maker already knows.
4. The Tribunal erred in law in failing to conclude that it may appear to a decision-maker that a third party might reasonably wish to make an exemption contention in respect of a document if there is some prospect that (sic) decision-maker might accept that contention.
5. Having expressly found that consultation might be required in respect of an entry in the Attorney-General's diary that only recorded the name of the person meeting with the Attorney-General (Reasons, [48]-[49]), and thus having implicitly found that there was some prospect that such an entry might be exempt, the Tribunal erred in law in concluding that the third-party named an entry of that kind would not, in the ordinary course, need to be consulted under ss 27 or 27A of the FOI Act.

The parties' submissions

36 As to question 1, the present applicant submitted that the Tribunal's rejection of the primary decision-maker's estimate was based on the premise that when determining whether a diary entry was exempt, it was not appropriate to go beyond the face of the entry itself unless "there is some suggestion on the face of the entry" that that needed to be done. The applicant submitted it was that premise that led the Tribunal to conclude, at [74], that "a comfortable majority of entries would not require anything like two minutes to examine". The applicant submitted that the premise was flawed as the *FOI Act* did not expressly confine the decision-maker's task in that way and such a restriction could not be implied. This was because, the applicant submitted, it was often necessary to understand the context in which a document was created in order to determine whether the document was exempt and, in some cases, to determine whether the document was subject to the *FOI Act* in the first place. It might also be necessary, the applicant submitted, to understand what else was in the public domain when determining whether it would be unreasonable to disclose the document. The applicant submitted that the Tribunal's approach was "impermissibly restrictive" and not authorised by the *FOI Act*. The Tribunal should have concluded that, in calculating the resources required to determine whether to grant, refuse or defer access to the documents requested, it was permissible to consider the resources required to look at other, extrinsic documents. The applicant put forward what the applicant described as a practical example where a diary entry referred to a meeting between the Attorney-General and a Parliamentary figure. In that example, the applicant submitted, it would be necessary to determine whether the entry related to the official duties of the Attorney-General as a Minister but it would often not be possible to determine that matter without going beyond the diary entry itself. Contrary to the approach adopted by the Tribunal, it would often be necessary to make further inquiries and look at other documents.

37 As to question 2, the applicant submitted that where there were some prospect that the diary entry may be exempt under either the personal affairs or business affairs exemptions, and hence some prospect that an exemption contention might be accepted, the requirement that it appeared that the third-party "might reasonably wish to make an exemption contention" would ordinarily be satisfied.

38 The applicant then referred to the findings made by the Tribunal at [48] and submitted that, the Tribunal having so found, it should have found that consultation with the third-party was

warranted to determine whether appropriate circumstances existed. Instead, the Tribunal found that the requirement to consult arose only if it appeared from the face of the diary entry, or from anything else actually already known to the decision-maker, that the third-party might reasonably wish to make an exemption contention. The applicant referred to [44], [45], [46] and [49] of the Tribunal's reasons.

39 The applicant submitted this approach was unduly narrow and gave as a hypothetical example a diary entry recording a meeting with a particular member of the religious community. It might not be apparent to the decision-maker why a meeting with the person was sensitive. On the Tribunal's approach, no consultation would be required unless the decision-maker happened to know the sensitivity associated with disclosure.

40 The applicant submitted that the Tribunal erred in law in concluding that the requirement to consult arose only if it appeared from the face of the diary entry or from anything else actually already known to the decision-maker that the third-party might reasonably wish to make an exemption contention. The Tribunal should have concluded, the submission went, that the requirement to consult may arise if there is merely some prospect that the decision-maker might accept that exemption contention. The question was not whether the decision-maker would accept that contention. The question whether the documents were, in fact, exempt must be determined subsequently. The applicant submitted that the number of people to be consulted was significant and could be estimated at 130. This was the figure ultimately given by Mr O'Sullivan in cross-examination as reflecting "a conservative estimate" of the actual number of people who would have to be consulted, as opposed to the figure of 263 in his affidavit which represented his estimate of the number of people who might need to be consulted.

41 The respondent submitted that the Tribunal's decision turned on findings of fact about what was required by the decision-maker under the *FOI Act*, given the particular documents sought by the respondent.

42 The respondent submitted that the relevant prism was assessing whether processing the particular request would "substantially and unreasonably interfere" with the performance by the applicant of his functions, such that he was permitted to refuse to consider the request at all (ss 24(1) and 24AA).

43 The respondent submitted that the construction of the *FOI Act* by the Tribunal was the correct one and the errors as identified would not be vitiating errors.

44 The respondent submitted that the applicant's approach to the *FOI Act* was wrong in that the applicant assumed that each document was potentially exempt and obliged the decision-maker to exhaust all possible avenues of enquiry to satisfy himself or herself that it was not exempt. The Tribunal's approach, which the respondent submitted was the correct one, was that because documents were to be released under the *FOI Act* unless they were exempt, a decision-maker must have some rational basis, either from the document or their own knowledge, for believing that a document may be exempt before they consult extrinsic material or third parties to see if their belief is correct. Only the latter approach, the respondent submitted, was consistent with the practical application of the *FOI Act* and gave effect to its objects.

45 In his written submissions in reply, the applicant submitted that the relevant question of law was whether a decision-maker, when considering whether a third party might reasonably wish to make an exemption contention, was necessarily confined to considering the face of that document and what the decision-maker already knows.

46 The applicant also submitted that he was not suggesting that the decision-maker must take possible but unreasonable lines of inquiry; rather, that the decision-maker must take all reasonable steps in the circumstances to ensure that he or she makes the correct or preferable decision.

47 In response to any suggestion that the applicant was contending that the decision-maker must consult all, or most, third parties, the applicant clarified that he conceded that several people who were named in the diary could not reasonably wish to make an exemption contention and did not need to be consulted. The applicant confirmed in oral submissions that this class of people included other Ministers, ministerial advisors, journalists and public servants.

48 The applicant confirmed that his position was to the effect that whether a document is exempt depends on all the circumstances, which includes the attitude of the person whose name appeared in a diary entry. He contended that such a person "should be consulted (on the basis that they might reasonably wish to make an exemption contention) if the decision-maker forms the view that the document *might* be exempt". (Original emphasis).

Consideration

49 The starting point must be to determine what the reasons of the Tribunal mean in the context of the submissions and evidence with which it was dealing.

50 It is then necessary to turn to s 24 of the *FOI Act* and identify the statutory question. The question is whether the Tribunal erred in law in not being satisfied that a practical refusal reason existed in relation to the request(s). It is next necessary to turn to s 24AA to determine whether the Tribunal erred in law in finding that the work involved in processing the request(s) would not substantially and unreasonably interfere with the performance of the Attorney-General's functions and that a practical refusal reason did not exist in the present case. In so deciding, the Tribunal must have regard to (a) the resources that would have to be used for identifying, locating or collating the documents within the office of the Attorney-General (which is not presently relevant), and (b) the resources that would have to be used for deciding whether to grant, refuse or defer access to a document to which the request relates or to grant access to an edited copy of such a document, including resources that would have to be used, relevantly, for examining the document or consulting with any person or body in relation to the request.

51 The Tribunal's decision turned on the extent to which resources would have to be used for consulting with any person or body in relation to the request. This can be seen at [15] of the Tribunal's reasons which refers to an estimate of the resources that would have to be used on the basis of requirements for consultation but where the *FOI Act* did not require consultation.

52 Fundamental to the Tribunal's assessment, as the Tribunal said at [30], was that the format of the diary showed only the date, time and certain limited meeting or appointment details such as the identity of the person or persons involved in the meeting or appointment and, in some cases, brief (one or two words) descriptions of the nature or purpose of the meeting. It did not show any related invitations, correspondence, or background or briefing documents.

53 The Tribunal was not persuaded that it would be necessary to check the background or meeting records associated with each diary entry: see the reasons of the Tribunal at [31].

54 At [34] and following the Tribunal dealt with the primary decision-maker's concerns about security risks. This does not seem to be the subject of the appeal.

55 At [40], the Tribunal's reasons turn to diary entries concerning meetings with business representatives and individuals. The submission that was rejected at [40] was that if nothing

more than the name of the business representative or individual appeared in the diary it would nevertheless be necessary **in every case** to go behind the entry and examine associated documents and undertake a complex process of working out whether disclosure might unreasonably disclose business or personal information of the relevant kind so as to require consultation with the business or person concerned. There is no ground of appeal to the effect that the Tribunal misunderstood the submission that was being put on behalf of the Attorney-General.

56 Again, at [42], the Tribunal identified the submission on behalf of the Attorney-General founded on s 27 of the *FOI Act*. The issue under that provision was, relevantly, whether it appeared to the Tribunal that the person, organisation or proprietor of the undertaking (the person or organisation concerned) might reasonably wish to make a contention (the exemption contention) that the document was exempt under s 47 (trade secrets etc.) or the document was conditionally exempt under s 47G (business information) and access to the document would, on balance, be contrary to the public interest for the purposes of s 11A(5). As the Tribunal pointed out, the test was not whether it appeared (to the Tribunal) that a person might wish to make an exemption contention but rather whether it appeared (to the Tribunal) that a person might **reasonably** wish to make an exemption contention. We see no error in the Tribunal stating that there must be some rational basis which the decision-maker, here the Tribunal, can discern which indicates that disclosure of the document would, or could be expected to, unreasonably affect such a person adversely in respect of his or her lawful business or professional affairs. This approach is reflected in the express terms of ss 27 and 27A (i.e. the consultation provisions), both of which have the following relevant features:

- (a) the obligation to consult only arises if **it appears to the decision-maker** that a particular state of affairs exists; and
- (b) this state of affairs is that the business organisation or person concerned **might reasonably wish** to make an exemption contention.

57 These matters reinforce the need for there to be a rational basis not only for the existence of the decision-maker's opinion or belief, but also for the subject of that opinion or belief, namely that a business organisation or person might reasonably wish to make an exemption contention.

58 At [44], the Tribunal stated it was unable to discern a rational basis upon which it could appear in every such case, where there was nothing more than an entry in the diary of a name

or names of a business representative (and the business name) who might have met with the Attorney-General, that the person concerned might reasonably wish to make an exemption contention. Again, there was no ground of appeal directed to a proposition that the Tribunal misunderstood the submission that was being put, that submission being that in **every such case** consultation was necessary.

59 It followed, the Tribunal found, at [45], that there did not need to be a lengthy process of considering whether the person must be given the opportunity to make an exemption contention for the purpose of s 27 for every meeting. The Tribunal accepted however that the circumstances of each particular case must be considered by the decision-maker.

60 Correctly read, the reasons of the Tribunal at [45] mean that the Tribunal was not satisfied on the facts that **in every case** it was necessary for the decision-maker to consult a person in order to decide whether that person was to be given the opportunity to make an exemption contention as contemplated by s 27.

61 In our view the taxonomy put on behalf of the applicant in this appeal was not one which was put to the Tribunal itself. That taxonomy was that in the first class of case a decision-maker could make a determination that a document was not exempt by looking at the entry; in the second class of case the decision-maker could look at the entry and determine that it was an exempt document; and in the third class of case the decision-maker could not determine one way or the other looking at the face of the document whether the document was exempt or not. In such a case the decision-maker should, it was submitted, ordinarily consult the business or person referred to in the diary entry. This third category was later qualified in oral submissions to be a category where the decision-maker could not determine one way or the other looking at the face of the document whether the document was exempt or not but where there was a possibility that it was exempt.

62 In assessing whether or not the Tribunal misdirected itself at [45], in our opinion it is important to bear in mind that the Tribunal had before it as a confidential exhibit six weeks of extracts from the diary in the format in which the diary was sought under the *FOI Act*, i.e. showing only the date, time and certain limited meeting or appointment details such as the identity of the person or persons involved in the meeting or appointment and, in some cases, brief (one or two words) descriptions of the nature or purpose of the meeting. The confidential exhibit was ultimately made available to the Court in the appeal.

63 In our opinion there is a danger in attempting to restate by paraphrase what it is that the relevant sections state, which is that it **appears to the decision-maker** that the person **might reasonably wish** to make an exemption contention: see ss 27(1)(b) and 27A(1)(b). This is what the third class of case in the applicant's taxonomy does. There would then be debate about the nature of the possibility.

64 The taxonomy also, in our opinion, importantly and indeed fundamentally omits to take into account the perspective of the Tribunal which was hearing evidence from the very persons who would be best placed to know the significance of the entries in the diary. It does not appear to us that any evidence or other material was put before the Tribunal to suggest that one or more of those persons did not know the significance of the entries in the diary. Indeed it does not appear that any evidence or other material was put before the Tribunal showing who it was who made the entries into the diary. In those circumstances we would be slow to find error in the Tribunal's practical analysis of what the decision-making process would be in dealing with an argument that in every such case and for every meeting it was necessary to consult.

65 As the Tribunal put it, at [46], there is no need, in every case of the entries in this particular diary, to consult a person in order to decide whether the *FOI Act* makes it necessary to consult that person.

66 It is also important to bear in mind that the Tribunal was not dealing with the exemptions themselves but with an application where it was put that the work involved in processing the request(s) would substantially and unreasonably interfere with the performance of the Attorney-General's functions. The Tribunal's task was to analyse the evidence or other material put before it, bearing in mind the onus of proof carried by the Attorney-General of establishing that the decision made by the primary decision-maker was justified or that the Tribunal should give a decision adverse to the present respondent.

67 Further context is provided by the statements or findings of the Tribunal at [47]-[51] where the Tribunal said that it did not accept that these entries in the ordinary course would require extensive consideration and consultation but accepted that there might be another class of entries in the diary where there was some reason which made the entry particularly sensitive, although the Tribunal saw no obvious examples in the diary extracts. The Tribunal therefore found as a fact that such entries would be rare.

68 The Tribunal made the same findings in relation to the personal privacy exemption, which the Tribunal considered at [49]-[51].

69 The Tribunal examined each entry in the extracts provided and also dealt with the three specific examples pointed to by the primary decision-maker where he considered consultation might be required.

70 In our opinion, no error in respect of the questions of law has been established.

Conclusion and orders

71 For these reasons, the appeal should be dismissed. The applicant must pay the respondent's costs, as agreed or assessed.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko, Robertson and Griffiths .

Associate:



Dated: 6 September 2016