INTERNAL WORKING DOCUMENTS AND THE PUBLIC INTEREST IN NEW SOUTH WALES

A paper delivered by Mark A Robinson, Barrister,
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Introduction

I am speaking to you on a topical issue. Namely, what is left to argue about as to the "internal working documents" exemption after the NSW Court of Appeal's decision in *General Manager, WorkCover Authority of NSW v Law Society of NSW* (2006) 65 NSWLR 502 (Handley, Hodgson and McColl JJA).

Clause 9, of Part 3 of Schedule 1 of the *Freedom of Information Act* 1989 (NSW) provides:

> "9 **Internal working documents**
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> (1) A document is an exempt document if it contains matter the disclosure of which:
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> (a) would disclose:
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> (i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or
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> (ii) any consultation or deliberation that has taken place,
>
> in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency, and
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> (b) would, on balance, be contrary to the public interest.
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> (2) A document is not an exempt document by virtue of this clause if it merely consists of:
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> (a) matter that appears in an agency's policy document, or
>
> (b) factual or statistical material."

In the NSW Auditor-General's report *Performance Audit of the Freedom of Information Act* dated August 2003 ("**the Auditor-General's Report**"), which related to an "FOI audit" of three State Government agencies and examined the treatment of

84 requests for non-personal documents, the Auditor-General identified the internal working documents exemption as problematic for agencies and said (at page 63):

> "The exemptions which agencies found most difficult to explain related to Cabinet documents and internal working documents. Another problem related to public interest considerations which must be applied when using some exemptions. The public interest considerations were often insufficiently explained or omitted completely."

The Correct Approach to Cl 9

Before you arrive at the public interest issues in the clause, one must first be confident that the subject document is properly and firmly identified as a document that it:

(a) Contains "matter" that would disclose:

- An opinion, advice or recommendation;
- A consultation or deliberation; and,

(b) Which has the necessary purpose or connection with the "decision-making functions" of the agency.

Each of these words and expressions has received consideration in the decided cases. FOI decision-makers must plainly identify and record their understanding of them and how each subject document is properly said to be classed as falling within clause 9(1)(a) of the Act.

Once identified and before any public interest considerations can apply under cl 9(1)(b) so as to exclude the documents, decision-makers should ascertain the extent to which the documents contain factual or statistical material. To the extent that they do, those parts of the documents can be and should be released to the FOI applicant, if that is what the applicant wishes. In all FOI applications the decision-maker is required to consider whether access should be granted to exempt documents in a form by which any asserted exempt matter is deleted from the face of the documents (if that is practicable and that is what the applicant would wish) as required by section 25(4) of the FOI Act and as permitted by section 28(2)(c) of that Act (*Taylor v Chief Inspector, RSPCA* [1999] NSWADT 23 at [46]-[48]).

The facts of *WorkCover* decision (*General Manager, WorkCover Authority of NSW v Law Society of NSW* (2006) 65 NSWLR 502) were summarised in the decision itself as follows:

> "In October 2001 the WorkCover Authority of New South Wales retained Michelle Castle, a solicitor and legal costs assessor, to advise it in relation to its review of the legislative regime of costs in workers compensation matters. On 1 January 2002 the *Workers Compensation (General) Amendment (Costs) Regulation 2001* (the "*General Costs Regulation*"), which dealt with costs recoverable by legal practitioners in claims for workers compensation matters, commenced. Prior to the commencement of the General Costs Regulation the Government and the Law Society agreed to review its operation to ensure its objectives were being met. In late 2002 Ms Castle gave WorkCover advice relating to submissions made by the Law Society as part of the review. In December 2002, pursuant to s 16 of the *Freedom of Information Act 1989* (the "*FOI Act*"), the Law Society applied to WorkCover for access to documents produced by Ms Castle for the purposes of the review. WorkCover determined the documents were exempt from production on four grounds: legal professional privilege (FOI Act Sch 1, cl 10), that they were internal working documents whose disclosure would be contrary to the public interest (FOI Act, Sch 1, cl 9), that they were the subject of a secrecy provision (FOI Act, Sch 1, cl 12,) and that they were contained confidential material (FOI Act, Sch 1, cl 13).
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> The Law Society applied to the Administrative Decisions Tribunal for a review of WorkCover's determination. The Tribunal upheld WorkCover's determination that the disputed documents were subject to legal professional privilege. It did not consider WorkCover's other claims for exemption. The Law Society appealed. The Administrative Decisions Tribunal Appeal Panel allowed the appeal and held that the Judicial Member had erred in law in concluding the disputed documents were subject to legal professional privilege. The Appeal Panel acceded to an application by the Law Society to extend its appeal to the merits in order to consider WorkCover's other exemption claims and in its second decision held that WorkCover had not made out any of those claims. WorkCover appealed from both decisions.
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> WorkCover tendered the disputed documents as a confidential exhibit before the Tribunal and Appeal Panel. On appeal WorkCover did not consent to the Court inspecting the disputed documents."

The Court upheld the Appeal Panel's decision on, *inter alia*, the legal professional privilege and internal working documents exemptions.

The important things to take from the *WorkCover* decision as to cl 9 are as follows:

1. There is no “leaning approach” to FOI matters and the balancing of the public interest (following the Federal Court approach and the approach accepted in the ADT) (at [150]).

2. The two principal matters of public interest that are important and that must be balanced are that the decision-maker must weigh:

    a. the public interest in citizens being informed of the processes of their Government and its agencies on the one hand;

    b. against the public interest in the proper working of Government and its agencies on the other (at [151]).

3. That is the starting point for public interest considerations and necessary deliberations.

4. The concept of public interest in cl 9(1)(b) of the FOI Act should not be constrained by rigid rules (such as the *Howard* Factors) or determinative guidelines (at [157]);

5. Rather, it should be approached by application of a flexible, open ended test (at [157]).

6. If an agency wishes to contend or argue that disclosure would be contrary to the public interest, it is obliged to demonstrate that as a “factual” matter rather than as a theoretical proposition (at [158]). The agency bears the onus of proof in this regard in Tribunal proceedings - s 61 of the FOI Act (and see *WorkCover* at [16]).

7. As to the balancing exercise of the competing public interest positions, the decision-maker must possess some considerable discretion in balancing the interests (which will rarely be the subject of judicial review for error of law or jurisdictional error) (at [166]).

8. Each case will turn on its facts (at [167]).

9. As to arguments of an agency based on interim or draft reports and the potential for such reports to mislead the public at large, any cl 9(1)(b) public interest issue should be determined by reference to the facts of the particular application and not by reliance upon theoretical possibilities which might flow if disclosed documents thereafter gained wider release (from the FOI applicant to the public at large) (at [162]).

10. The Court of Appeal signalled that section 59A of the FOI Act (which provides that in deliberations on whether the disclosure of a document would be contrary to the public interest it is "irrelevant" that the disclosure may cause embarrassment to, or a loss of confidence in the Government, or may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason) would be given a wide interpretation (at [161] to [164] & [167]).

11. The application of section 59A(a) (embarrassment or loss of confidence) is positively strengthened by the Court of Appeal decision partly because it has been held to be "consistent with the policy of the Act" (at [164]).

12. Section 59A(b) (misinterpret or misunderstand due to an omission) demonstrates a legislative intention that disclosure of incomplete or possibly misleading documents does not detract from the public interest in disclosure (at [167]).

13. In the case of an alleged "misleading" document, the public interest requires that the potential of a document to mislead must be weighed in the balance in determining whether a document is exempt, as too, must the potential (presumably for the agency itself) to "correct" any misleading impression (at [167]) (while also noting that the point cannot go to the public interest considerations in any event by reason of s 59A).

14. The correct time to assess the public interest is as at the time (date) of the FOI determination (or the ADT determination or appeal) (*WorkCover* at [102] & [123].

What is left to Argue About after the WorkCover Decision?

There remains plenty for a government agency and for FOI applicants to argue about in support of or in seeking to challenge a claimed exemption under a claim of public interest under the internal working documents exemption.

WorkCover confirms that the public interest factors are broad and the ultimate decision is to a large extent discretionary. This gives the FOI decision-maker considerable scope within which to divine and articulate any appropriate reasons for access refusal under the cl 9 exemption.

However, the public interest factors alleged must be:

- plainly identified;
- logical and rational;
- supported by evidence (which is itself logical, rational and probative) (or capable of being supported by evidence if tested in a Tribunal); and/or
- supported by argument that is preferably succinct and cogent.

These are tall orders and often difficult for FOI decision-makers to comply.

In *Bennett v Vice Chancellor, University of New England* [2000] NSWADT 8 at [63], Deputy President Hennessy spoke about the minimum standard and quality of the evidence the Tribunal required to establish the fact that disclosure would inhibit candour and frankness within Government in the context of clause 9 in the following terms:

> "Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. . . . In the absence of ***clear, specific and credible evidence***, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act." (my emphasis)

In an urgent late-night injunction application in the High Court of Australia in 1999 before Justice Hayne (where he was asked to stop a deportation of an illegal non-citizen scheduled to occur that evening - *M.I.P. Ex parte: The Minister for Immigration and Multicultural Affairs* M30/1999 (29 March 1999)), the following exchange took place between counsel and the bench:

Mr Gunst: We understand the force of that argument, your Honour. We put our submissions. We put them as forcefully as we can. We acknowledge that the test - the threshold is a low one.

HayneJ: I smile because one other member of the Bench in response to a submission that was said to be put forcefully replied, "You can put it with all force you like but would you please put it with cogency".

As a practical matter, FOI decision-makers should make their starting approach as being guided by application of the principles in *Tunchon v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 73 (*Tunchon*) (Judicial Member Smith) where he said the Tribunal's task (and therefore the FOI decision-maker's task) is that (at [16]):

> "… the exemption requires me to identify the circumstances surrounding the particular decision-making, discover the role which has been or is to be played by the document in that decision-making, and consider the extent to which retaining secrecy for the document is at present necessary for "the proper administration of the Government" in that particular decision-making process (c.f. s 5(2)(b))."

This is the first matter that ought to be attended by an agency decision-maker seeking to claim the internal working documents exemption. Smith JM (now, Smith FM) went on to state (at [17]):

> "This inevitably requires a "value judgment" as to the "public interest" on what level of openness should accompany or follow the particular decision-making process. Such judgments can be difficult to form and rationally to explain. For my part, I am assisted by parties informing my judgment by leading evidence on contemporary standards of openness from decision-makers and experts in the relevant field of decision-making."

I respectfully agree (assuming the said "contemporary standards" exist and are able to be ascertained and articulated).

It is often the case that the FOI primary decision-makers in any FOI application possesses more knowledge about internal agency processes and reasons for doing things than any external Tribunal member or Panel of members (or, perhaps anybody else). How the agency operates and the interrelationships and factual dynamics that exist must be ascertained and explained plainly by the FOI decision-maker. If not known, they should take the trouble to find them out and explain them in the decision or before a Tribunal on review.

The main area where disclosure can be more readily resisted by an agency is where there is an interim report or a report on a matter relating to a decision-making process that is still on foot and release of the documents would interfere with or adversely affect the remaining process. The Appeal Panel of the ADT recognised this in *Director General, Department of Community Services v Latham* (GD) [2000] NSWADTAP 21 at [35]-[36].

In *Tunchon* , the Tribunal considered whether the exemption applied to an important report obtained by the Commissioner of Police from independent management consultants which gave detailed advice on how he could restructure the Police Service's "Human Resources Services" ("HRS"). This branch or "command" of the Service comprised numerous civilian employees and police officers who provide the Police Service with a very wide range of personnel services, including on policy, recruitment, promotions, industrial relations, workers' compensation, health and welfare matters. The Commissioner had announced a commitment to implement sweeping changes by reference to the report. Many changes had been completed and more were then known to have been under deliberation. However, the Commissioner declined to make the report public. The Tribunal agreed, arguing that (at [27]):

> "… there is, in my opinion, a clear public interest in continuing the secrecy surrounding some of the contents of the Report, at least until after the time when the Commissioner is able to make such further decisions as would be prejudiced by its premature release. I consider that on the evidence before me this time has not yet been reached."

Tunchon was considered and relied on in the Appeal Panel of the ADTR in the original decision on the exemption in *Law Society of New South Wales v General*

Manager, WorkCover Authority of New South Wales (No 2) (GD) [2005] NSWADTAP 33.

In that case, the Appeal Panel considered the cases where it was alleged that deliberations were incomplete and the documents should accordingly be exempted. The Appeal Panel said (at [76] to [82]):

> "The case law provides some guidance as to the circumstances in which the public interest requires that documents be kept confidential because deliberations are incomplete.
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> *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551 (Harris) involved a review of the legal department of a statutory corporation. The person appointed to conduct the review had submitted interim reports recording complaints made against the head of the legal department and had invited her to make comments or submissions on them. The head of the legal department opposed another employee's application for access to the interim report. Beaumont J held at 563 that 'full disclosure of the reports, at this stage, would, on balance, be contrary to the public interest.' This was because disclosure of provisional or tentative views 'could create a misleading, perhaps unfair, impression in the minds of readers who do not have the benefit, if there be any, of knowing the response of the [head of the legal department] (at 563).
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> *Harris* can be distinguished from the present case in that Harris involved a report which was clearly in a draft stage awaiting comments from a person adversely affected by it. In this case, Ms Castle's report was her last report, and is not of a nature involving adverse findings against an individual.
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> *Tunchon v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 73 concerned a request for access to a report relating to the restructuring of the Police Service. The restructure had partially taken place, but the Commissioner was still involved in making decisions on some matters. In that case, the Tribunal was satisfied that there were 'real grounds for a concern that the Commissioner's continuing process of decision-making could be seriously impaired by a premature release of the Report' (at [26]).
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> In *Simpson v Director General, Department of Education and Training* [2000] NSWADT 134 the applicant sought access to a draft report prepared by a departmental officer in the context of a review of the rates of pay, working conditions and entitlements of casual teachers. The draft report was never completed because negotiations between the agency and the union broke down. There was a longstanding dispute between the agency and the union over pay and conditions for casual teachers which still existed at the time of the hearing, some 6 years after the report was created. Hennessy DP noted at [88] that

> ‘the negotiations in relation to the terms and conditions of employment for casual teachers have progressed considerably since 1994. The content of the draft report does not represent either the previous or current negotiating position of either party. Even if it did represent the thinking of some of the members of the working party in 1994, that thinking has long been superseded by further negotiations and the pursuit of award applications in the Industrial Relations Commission. An ‘in principle’ agreement has now been reached between the parties subject to further negotiations on questions of detail. Some of the same issues canvassed in the draft report have still not been resolved, but the content of the draft report is not, in any sense, part of the agency’s current ‘thinking processes’.’

Accordingly, she concluded that the public interest considerations were weighted in favour of disclosure.

These cases demonstrate that whether deliberations can be regarded as finalised is ***a question of degree***. In *Tunchon* the process of departmental restructure was held to be ongoing notwithstanding that some reforms had been implemented. In *Simpson*, however, a report ceased to be part of an agency’s current thinking processes in ongoing negotiations on a contentious topic due to the passing of time and the changed negotiating positions of the parties.” (my emphasis)

The primary reason the WorkCover documents were declared by the Court of Appeal not to be exempt under cl 9 by the Appeal Panel was that there was a factual controversy (*WorkCover CA* at [116]) and, as a factual matter, Ms Castle’s report was her last report and, the agency had reached a point of “intermediate conclusion” and in fact it had already made 2003 Regulations based on the controversial “event-based costing” (as opposed to providing for time costing in the traditional fashion) (*ibid* at [117]- [118]).

Other areas where there is still plenty of scope for an agency to seek reliance on the exemption, and, accordingly, where there scope for an FOI applicant to mount a challenge, include where it can be the decision-maker can be comfortably satisfied that:

- release might give rise to uninformed debate and public commentary that might affect the rights of third parties to a fair hearing - *Edlund v Commissioner of Police, New South Wales Police* [2003] NSWADT 195 (President O'Connor DCJ);

- disclosure could reveal to witnesses the evidence of other witnesses and so expose their evidence to challenge (*ibid*);

- disclosure could compromise the safety of the agency's staff – *Richards v Transport Accident Commission* [2005] VCAT 1444;

- information is obtained in confidence relating to confidential relationships;

- disclosure would inhibit candour and frankness within Government (as to these, see generally, the NSW Crown Solicitor's FOI annotations and commentary in Robinson, *NSW Administrative Law*, (looseleaf) Volume 1, at para [32.3810] to [32.3895]).

If further inspiration is sought relating to how an internal working documents claim might be best expressed, there are plenty of precedents published in the decided cases.

Most recently, the High Court of Australia reproduced the terms of the Federal Treasurer's exemption claim (made in the form of reasons for a conclusive certificate made under the Commonwealth's FOI Act) in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 ([2006] HCA 45) (6 September 2006) (esp at [80] per Callinan and Heydon JJ). The running commentary in the High Court's judgment at the noted paragraphs is most instructive to FOI practitioners.

While there is no similar procedure in NSW to the "conclusive certificate" used in the *McKinnon case* in the area of the internal working documents exemption, the discussion by the High Court might well be of use for FOI decision-makers in their seeking to divine a path through the internal working documents maze.

Thank You