Information access Barrett Appeal decision

Whether an agency can substitute new decision after a review application has been filed, whether in decisions to refuse to confirm or deny an agency is obliged to give detailed reasons and the weighing of considerations when an agency is seeking to refuse to confirm or deny information is held Commissioner of Police, NSW Police Force v Barrett [2015] NSWCATAP 68

What you need to know

The appeal by NSW Police against two earlier decisions by the Tribunal was upheld by the Appeal Panel on errors of law. The Appeal Panel, in the interests of not causing delay, set a directions hearing where they will consider whether to dispose of the matters themselves.

The decision provides authority for

1. There is no unilateral general power given to an agency to change a final decision, and that the provisions of the GIPA Act support that a decision once made binds the agency unless clear statutory mechanisms are utilised to alter it. Any change of decision in relation to any access application must fall within a head of power provided by the *Government Information (Public Access) Act 2009* (GIPA Act) or by other legislation such as the *Administrative Decisions Review Act 1997* (ADR Act) when the matter is before the Tribunal.

2. Consistent with the view of the Information Commissioner in her submissions to the Tribunal in the earlier decisions, that generally it is preferable for agencies to give as many reasons as they can to help applicants to understand the basis for the decision, taking into account circumstances where information is of a sensitive nature. This point is confirmed in the Appeal Panel decision at paragraphs 70 to 72.

3. The weighing of the considerations set out in section 14 against the general considerations that favour disclosure (section 12) will not exhaust the task when an agency is seeking to invoke section 58(1)(f) (refuse to confirm or deny). There remains a separate question about the circumstances of the case that justify the further decision of refusal to confirm or deny the existence of the information.

4. The examples to the note at section 12(2) are merely illustrative. In contrast the public interest considerations against disclosure are statutory and must be given legal meaning. The Appeal Panel upheld the primary grounds of appeal in relation to the Tribunal's reasoning in relation to items 1 to 5.

Legislative background

The Appeal Panel noted there are six kinds of final decision in relation to an access application as set out in section 58(1) of the GIPA Act. In a joint application, Mr and Mrs Barrett sought access to seven items, NSW Police made the following negative (with one exception) decisions in relation to the items:

- Items 1 to 5 to refuse to disclose in terms of section 58(1)(b) relying on the OPIADs in the Table to section 14 1(f),1(h) and 2(b)
- Item 6 and 7 Mr Barrett – no records held, refuse to disclose in terms of section 58(1)(b)
- Items 6 and 7 Mrs Barrett – refuse to confirm or deny in terms of section 58(1)(f)

Factual background

NSW Police appealed against two decisions by SM Isenberg at first instance – *Barrett v Commissioner of Police NSW Police Force* [2015] NSWCATAD 31; and *Barrett v Commissioner of Police, NSW Police Force* [2014] NSWCATAD 32.

Initial decisions by agency: The decisions related to a number of items (1 to 7). The agency initially for items 1 to 5 refused to release the information in full for both Mr and Mrs Barrett citing the following overriding public interest considerations against disclosure:

- Table to section 14 1(f) disclosure could reasonably be expected to prejudice the effective exercise by an agency of its functions.
- Table to section 14 1(h) disclosure could reasonably be expected to prejudice the conduct, effectiveness or integrity of investigation conducted by an agency by revealing its conduct or results.
- Table to section 14 2(b) disclosure could reasonably be expected to prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law.

In relation to item 6, Mr Barrett was initially told that no documents were held, but during the review proceedings at the Tribunal the agency amended this decision to advise that the position should have been that of section 58(1)(f) to refuse to confirm or deny that the information is held by the agency because there is an overriding public interest against disclosure of information confirming or denying that fact.

In relation to Mrs Barrett the agency refused to confirm or deny under section 58(1)(f).

The decisions for item 7 were initially to refuse in full, then following an IPC review, the decision was no information was held for both Mr and Mrs Barrett, and later when the agency discovered a problem in searches, the position changed in relation to Mrs Barrett – the agency refused to confirm or deny information was held.

Review by the IPC: The IPC review of the agency decisions had recommended that the agency reconsider its decisions in relation to items 1 to 6 and in relation to item 7 to conduct all reasonable searches necessary to identify the information in item 7.

Tribunal decisions at first instance: The first decisions by SM Isenberg set aside the agency decision in relation to confirm or deny and remitted the matter to Police for reconsideration, and in relation to the OPIADs the decisions were set aside.

NSW Police appealed against both decisions.

Grounds of appeal: There were a number of grounds of appeal. In relation to decision 1 (about items 6 to 7) there were, as amended 10 grounds of appeal. The grounds of appeal for decision 2 (about items 1 to 5), as amended revised/ relied upon/ cited 3 grounds of appeal

Appeal decision: The decision was divided into three main considerations in relation to the grounds of appeal

1. Change or substitute a new decision during the Tribunal proceedings.

The Appeal Panel found that an agency is not able to substitute a decision during the Tribunal proceedings unless there is a power under the GIPA Act or the ADR Act to allow it. Although they did not disagree with the conclusion by SM Isenberg in refusing to allow the substitution of a decision by the agency, they found that SM Isenberg omitted to deal with the agency's decision at the time the review application was lodged and thus that part of the appeal was upheld.

2. Refusal to confirm or deny information held

The agency submitted on appeal that the Tribunal erred in holding that an agency is required to provide reasons where it makes a decision under section 58(1)(f).

The Appeal Panel was not satisfied that the Tribunal went as far as to rule the agency was obliged to furnish reasons to the applicant for a decision made under section 58(1)(f) but accepted that it strongly encouraged that course. Further the Appeal Panel noted:

71 The exclusion of the internal review provisions of the ADR Act (where the obligation to give reasons is first imposed under that Act) supports, we think, the agency's submission that, read as a whole, the GIPA Act manifests an intention to confine the positive obligation to give reasons to the most important category of reviewable decision, i.e. a refusal decision made pursuant to s 58(1)(d). The limited facility given by the ADR Act's provisions at ss 48-51 is ousted. Finally, as the submissions note, the well-known and controversial position in Australia is that there is no common law obligation on an administrator to give reasons for an administrative decision: *Public Service Board v Osmond* (1986) 159 CLR 656.

72 Read fairly and in context, we think that the Tribunal was merely commending the desirability of reasons being furnished even if, as argued, there is no legal duty to do so. In any case the Tribunal did not rest its ultimate determination as it relates to the agency's response on this point. For that reason, this ground of appeal is rejected.

The above is consistent with the submissions made by the Information Commissioner in the earlier Tribunal decisions and identified in paragraph 64 of the Appeal Panel's decision. However this issue was further explored by the Tribunal in considering the adequacy of reasons.

3. Adequacy of Tribunal reasons

The remainder of the issues before the Appeal Panel relate to the adequacy of the Tribunal's reasons for its decisions to

(a) not to uphold the agency's refusal to confirm or deny and to remit the matter for reconsideration in the case of items 6 and 7 for Mrs Barrett, and
(b) set aside the agency's decisions to refuse access to the information in items 1 to 5 for both Mr and Mrs Barrett based on the considerations for and against disclosure.

The Appeal Panel noted that freedom of information laws such as the GIPA Act have as a fundamental feature that agencies should tell an applicant whether they hold information that falls within the scope of the access request, and reveal its existence by giving basic description of the information held. Responses such as neither confirm or deny or refuse to confirm or deny negates the principle of transparency that underpins freedom of information or right to know legislation.

The Appeal Panel further commented that there would need to be special features unique to a particular case or as an example an area of operation of the agency where the records or information may be held that would justify the reliance on this ground – a key question is what is it about the case that justifies the response of choosing to refuse to confirm or deny that information of the kind sought by the access application do not exist.

The Appeal Panel observed that where the legislative considerations upon which the agency has relied are seen as sufficient to justify the refusal of the information, the separate question must then be addressed as to whether the agency refusing to confirm or deny is justified having regard to the agency's onus under section 105(1) of the GIPA Act.

At paragraphs 85 and 86 the Tribunal reasoning sets out a two stage process to satisfy the requirements of section 58(1)(f) and section 105(1). Firstly the agency must satisfy the requirement that the statutory considerations it relies upon are sufficient to justify refusal of access to any documents that are in existence. Next a separate question must be addressed. That question requires consideration of whether the agency's non-revelation of the mere existence of the documents is justified. The agency bears the onus of proof in accordance with section 105(1) and must satisfy the Tribunal in respect of both these two stages.

In relation to items 6 and 7 the Appeal Panel was of the view that the Tribunal decision needs to be revisited, which also would allow for examination of the attempt to substitute the decision in relation to Mr Barrett. It also found there were matters in the application that had not been addressed.

Information access Barrett Appeal decision

In relation to items 1 to 5 the Appeal Panel found the evidentiary basis relied upon by the Tribunal was inadequate to support a finding that 'disclosure … could reasonably be expected to reveal or substantiate that an agency (or member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct'. The Appeal Panel noted that it is a very serious matter for a Tribunal to accept section 12(2)(e) as relevant to its determination.

Further the Appeal Panel noted that the examples to the note at section 12(2) are merely illustrative. In contrast the public interest considerations against disclosure are statutory and must be given legal meaning. The Appeal Panel upheld the primary grounds of appeal in relation to the Tribunal's reasoning in relation to items 1 to 5.

As NSW Police did not apply for leave to extend to the merits, the Appeal Panel decided rather than remitting the decision to the Tribunal for reconsideration and therefore causing more delay, the Appeal Panel set a directions hearing to consider disposal of the matter.