



## ***'A' and Department of Health and Ageing*** **[2011] AICmr 4 (15 June 2011)**

Decision and reasons for decision of  
Freedom of Information Commissioner, Dr James Popple

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<b>Applicant:</b>	<b>'A'</b>
<b>Respondent:</b>	<b>Department of Health and Ageing</b>
<b>Decision date:</b>	<b>15 June 2011</b>
<b>Application number:</b>	<b>MR11/00008</b>
<b>Catchwords:</b>	<b>Freedom of Information — Documents to which secrecy provisions of enactments apply — (CTH) Freedom of Information Act 1982 s 38</b>
	<b>Freedom of Information — Whether Information Commissioner can exercise discretion to disclose protected information — (CTH) Freedom of Information Act 1982 ss 38(1A), 55K, 55L — (CTH) Aged Care Act 1997 s 86-3</b>

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## Summary

1. I affirm the decision of the Department of Health and Ageing (the **Department**) of 21 January 2011 to refuse the applicant access to documents about the applicant's deceased mother on the basis that the documents are exempt under s 38 of the *Freedom of Information Act 1982* (the **FOI Act**).

## Background

2. On 24 November 2010, the applicant made an FOI request to the Department for access to copies of records held by the Department relating to his deceased mother.
3. On 21 January 2011, the Department advised the applicant that it was not required to release those documents to him because they were exempt documents under s 38 and s 11A(4) of the FOI Act due to the application of the secrecy provisions of the *Aged Care Act 1997* (the **AC Act**).
4. On 3 February 2011, the applicant sought IC review of this decision under s 54L of the FOI Act.

## Decision under review

5. The decision under review is the decision of the Department of 21 January 2011 to refuse the applicant's request.
6. This IC review requires consideration of the interaction between provisions of the FOI Act and provisions of the AC Act. That interaction is complex and, in this case, leads to a result that does not sit comfortably with the IC review role under the FOI Act.

## 'Protected information' and 'exempt documents'

7. Part 6.2 of the AC Act covers the use and disclosure of 'protected information'. Section 86-1 of the AC Act defines 'protected information', which relevantly includes information that 'was acquired under or for the purposes of [the AC Act]' and is 'personal information'.<sup>1</sup> Section 86-2(1) and several other provisions in Part 6.2 make it an offence to disclose protected information.<sup>2</sup> Section 86-3 provides that the Secretary of the Department (the **Secretary**) may disclose protected information in certain circumstances.

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<sup>1</sup> Clause 1 of Schedule 1 to the AC Act provides that 'personal information means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

<sup>2</sup> Sections 86-5, 86-6 and 86-7.

8. Section 38(1) of the FOI Act relevantly provides:

**38 Documents to which secrecy provisions of enactments apply**

- (1) Subject to subsection (1A), a document is an exempt document if:
- (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment; and
  - (b) ...
    - (i) that provision is specified in Schedule 3 ...

The offence provisions in Part 6.2 of the AC Act<sup>3</sup> are specified in Schedule 3 to the FOI Act. So, a document that contains protected information for the purposes of Part 6.2 of the AC Act is an exempt document for the purposes of s 38(1) of the FOI Act.

9. Section 11A(4) of the FOI Act provides that an agency or minister is not required by the FOI Act to give a person access to a document if it is an exempt document. Section 55L of the FOI Act places a related limitation on the Information Commissioner's powers in an IC review. The section provides:

**55L Decision on IC review—no power to give access to exempt documents**

- (1) This section applies if it is established in proceedings on an IC review that a document is an exempt document.
- (2) The Information Commissioner does not have power to decide that access to the document is to be given, so far as it contains exempt matter.

Section 58(2), which applies to the Administrative Appeals Tribunal (the **Tribunal**), is in similar terms.

10. So, unless there are other provisions that apply:

- an agency or minister is not required by the FOI Act to give a person access to a document that contains protected information for the purposes of Part 6.2 of the AC Act;
- the Information Commissioner does not have the power to grant access to that document in an IC review; and
- the Tribunal does not have the power to grant access to that document in a review.

The possible application of s 38(1A) of the FOI Act and s 86-3 of the AC Act are discussed at [13]–[32] below.

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<sup>3</sup> Sections 86-2(1), 86-5, 86-6 and 86-7.

## The documents sought

11. The applicant requested a copy of the Aged Care Assessment Team (**ACAT**) assessment for his mother plus ‘full notes’. The Department identified documents relevant to the applicant’s request as the ‘ACAT assessment documentation, which includes the “full notes” relating to your mother ... compiled by the [named] District Hospital and the Aged Care Client Record ... signed by your mother and completed by the [named] ACAT on 30 July 2001.’<sup>4</sup>
12. These documents contain protected information for the purposes of Part 6.2 of the AC Act, because that information was acquired under or for the purposes of that Act and is personal information about the applicant’s mother. Disclosure of these documents is prohibited by s 86-2(1) of the AC Act. That provision is specified in Schedule 3 to the FOI Act. Accordingly, the documents sought are exempt documents for the purposes of s 38(1) of the FOI Act.

## Exempt documents to which s 38(1A) of the FOI Act applies

13. Section 38(1) is expressly subject to s 38(1A), which provides:
  - (1A) A person’s right of access to a document under section 11 or 22 is not affected merely because the document is an exempt document under subsection (1) of this section if disclosure of the document, or information contained in the document, to that person is not prohibited by the enactment concerned or any other enactment.

Significantly, s 38(1A) does not make exempt documents not exempt. A document that is exempt under s 38(1) remains exempt, even though a person’s right of access to it is not affected if disclosure to that person of information in that document is not prohibited by an enactment.

14. The obvious intention of s 38(1A)—to give certain people access to documents that cannot be accessed by others—would have been more simply achieved if s 38(1A) had provided that a document is not exempt if its disclosure to the person who has requested it is not prohibited.<sup>5</sup> This simpler approach is used in s 47F in relation to documents containing personal information.<sup>6</sup>

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<sup>4</sup> Letter from Department to applicant, 21 January 2011.

<sup>5</sup> The reference, in s 38(1A), to a person’s right of access to a document under s 11 or s 22 is problematic. The right of access under s 11 expressly does not apply to exempt documents. The same is true (indirectly) of the right of access under s 22.

<sup>6</sup> Section 47F(1) provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person. But s 47F(3) provides that s 47F(1) does not apply to the personal information of the person who has requested it.

15. The problem is not just one of drafting complexity. Because a document to which s 38(1A) applies remains an exempt document, and even though there is no prohibition on the disclosure of that document to a particular person:
- if that person requests access to that document, a minister or an agency is not required to disclose it to that person (s 11A(4));
  - if that person seeks IC review of a decision to refuse them access to that document, the Information Commissioner does not have the power to decide that the document should be disclosed to that person (s 55L); and
  - if that person seeks review by the Tribunal of an IC review decision to refuse them access to that document, the Tribunal does not have the power to decide that the document should be disclosed to that person (s 58(2)).

These consequences do not sit comfortably with the obvious intention of s 38(1A) that a person can be granted access to a document that cannot be accessed by others, if there is no prohibition on the disclosure of that document to that person.

16. The second and third consequences are more significant than the first. The FOI Act expressly does not limit any power that a minister or an agency has, apart from under the FOI Act, to give access to a document (s 3A). So, although ministers and agencies are not required to disclose exempt documents in these circumstances, they still have the power to do so. The Information Commissioner and the Tribunal do not have that power.

### **Protected information to which s 86-3 of the Aged Care Act applies**

17. Section 86-3 of the AC Act authorises the Secretary to disclose protected information to specified classes of people or in specified circumstances. For example, disclosure is authorised:
- if the Secretary certifies, in writing, that it is necessary in the public interest to do so in a particular case—to such people and for such purposes as the Secretary determines (s 86-3(a));
  - to a person who is, in the opinion of the Secretary, expressly or impliedly authorised by the person to whom the information relates to obtain it (s 86-3(b)); or
  - if the Secretary believes, on reasonable grounds, that disclosure is necessary to prevent or lessen a serious risk to the safety, health or well-being of a care recipient—to such people as the Secretary determines, for the purpose of preventing or lessening the risk (s 86-3(e)).
18. Section 96-2(1) of the AC Act provides that '[t]he Secretary may, in writing, delegate to an officer of the Department ... all or any of the powers of the Secretary under this Act'. In deciding to refuse the applicant in the current IC review access to the documents he requested, the Secretary's delegate has declined to exercise her discretion under s 86-3 in relation to the protected information contained in those documents.

19. The applicant argued that he was his mother's primary carer at the time of her death, and that she would have wanted him to have access to information about her held by the Department. This argument, and any supporting evidence the applicant could supply, would be relevant to a decision maker exercising the discretion conferred by s 86-3 of the AC Act.
20. However, the question arises whether, in conducting an IC review, I can exercise that discretion. If not, this argument is irrelevant to my decision.

### **Can the Information Commissioner exercise the power in s 86-3?**

21. Part VII of the FOI Act provides for review of FOI decisions by the Information Commissioner. Section 55K(2), which is in Part VII, provides:

#### **55K Decision on IC review—decision of Information Commissioner**

- (2) For the purposes of implementing a decision on an IC review, the Information Commissioner may perform the functions, and exercise the powers, of the person who made the IC reviewable decision.

22. Part VII was inserted into the FOI Act with effect from 1 November 2010. There has not yet been any judicial consideration of any of its provisions. However, there has been judicial consideration of the review powers of the Tribunal in the *Administrative Appeals Tribunal Act 1975* (the **AAT Act**). Section 43 of the AAT Act is in similar terms to s 55K(2). Relevantly, s 43 provides:

#### **43 Tribunal's decision on review**

- (1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision ...

23. In *Australian Securities and Investments Commission v Donald* (2003) 136 FCR 7, the Federal Court considered the review powers of the Tribunal. Kenny J, with whom Gray J agreed, considered s 43 of the AAT Act and held that:

... the Tribunal is not confined to the decision-making power upon which the previous decision-maker actually relied in making the decision under review, but is armed with all the powers and discretions of the original decision-maker that are relevant to the review.<sup>7</sup>

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<sup>7</sup> (2003) 136 FCR 7, 13-14 [24].

24. In considering what powers and discretions were relevant, her Honour quoted the Full Federal Court in *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 which said that:

... the powers and discretions referred to by s 43(1) are the powers and discretions vested in the original decision-maker for the purposes of making the decision under review. They do not include any powers and discretions which may be vested in the decision-maker for some other purpose.<sup>8</sup>

25. In *Donald*, Downes J came to the same conclusion as did Kenny and Gray JJ. On the question of the scope of the Tribunal's review power, he quoted approvingly Hill J in *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32:

Of course there must be an association between the power to be exercised by the Tribunal and the decision under review, but that association is to be found in the restriction of the grant of power in s 43(1) to the purpose of the Tribunal's review. The test is one of relevance rather than dependence. Where the exercise of a power or discretion is relevant to the making of the decision under review then, if requested, the Tribunal may exercise the discretion.<sup>9</sup>

26. So, given the similarities between the words of s 55K(2) of the FOI Act and those of s 43(1) of the AAT Act, the Information Commissioner when conducting an IC review—like the Tribunal when conducting a review—is armed with all the powers and discretions of the original decision maker that are relevant to the review.

27. But, although the exercise of the power in s 86-3 of the AC Act would clearly be relevant to the current IC review, there are two reasons why I cannot exercise that power: the decision of Branson J in *Illawarra Retirement Trust*, and the operation of s 55L.

28. In *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* (2005) 143 FCR 461, Branson J considered the interaction of s 86-3 of the AC Act with the FOI Act. Her Honour concluded that:

When the Secretary discloses protected information in circumstances authorised by s 86-3 of the Aged Care Act, the disclosure is made under the Aged Care Act, not under the FOI Act. Section 86-3 has no relevance, in my view, to the operation of s 38(1A) of the FOI Act as it does not affect a person's right to access to a document under the FOI Act. It is only the Secretary, acting under the Aged Care Act, who s 86-3 exempts from the prohibition contained in s 86-2. No other person may rely on the exception contained in s 86-3.<sup>10</sup>

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<sup>8</sup> (1988) 19 FCR 442, 452 [34], quoted in *Donald* (2003) 136 FCR 7, 14 [25].

<sup>9</sup> (1992) 37 FCR 32, 40 [26], quoted in *Donald* (2003) 136 FCR 7, 21 [58].

<sup>10</sup> (2005) 143 FCR 461, 474 [56].

29. I am bound by her Honour's decision, because it relates to the same provisions of the FOI Act and the AC Act as are relevant to the current IC review.<sup>11</sup> But, with respect, I do not agree that s 86-3 of the AC Act has no relevance to the operation of the FOI Act, which would seem to be her Honour's reason for concluding that only the Secretary can exercise the power in s 86-3. It is true that a decision made under s 86-3 in relation to the protected information contained in some documents does not change the fact that those documents are exempt for the purposes of the FOI Act.<sup>12</sup> But, a minister or an agency can give access to an exempt document, in response to an FOI application, so long as that disclosure is otherwise permitted (s 3A). Only the Information Commissioner and the Tribunal are prevented from deciding to disclose documents in these circumstances (by s 55L and s 58(2)).
30. So, for example, if a decision is made under s 86-3(b) of the AC Act that an FOI applicant is expressly or impliedly authorised by the person to whom protected information relates to obtain it, then the prohibition in s 86-2 would not apply: disclosure of that information to that FOI applicant would not be prohibited by the AC Act. This would mean that, although a document containing that information would still be an exempt document under the FOI Act, a minister or an agency could decide that the document be disclosed to that FOI applicant.
31. Applying the usual principles, the powers of the Tribunal or the Information Commissioner on review of a decision under the FOI Act would normally include those powers and discretions of the original decision maker that are relevant to the review. The exercise of the power under s 86-3 of the AC Act is clearly relevant to IC reviews like the current one. But Branson J's view in *Illawarra Retirement Trust* is clear from the passage I have quoted at [28] above: it is the Secretary alone who s 86-3 of the AC Act exempts from the prohibition contained in s 86-2, and it is the Secretary alone who can exercise a discretion under s 86-3.
32. In any event, even if I were able to exercise the discretion under s 86-3 of the AC Act, s 55L of the FOI Act prevents me from deciding that the documents that the applicant seeks should be disclosed to him.

## Findings

33. I have already concluded that the documents sought by the applicant contain protected information for the purposes of Part 6.2 of the AC Act and, therefore, are exempt documents for the purposes of s 38(1) of the FOI Act.<sup>13</sup>
34. I cannot exercise the discretion contained in s 86-3 of the AC Act. The Secretary, who alone can exercise that discretion, has (through her delegate) declined to exercise it in relation to the protected information in the documents sought by the applicant.

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<sup>11</sup> See also *Sellars and Department of Health and Ageing* [2006] AATA 296, [7].

<sup>12</sup> See [13] above.

<sup>13</sup> See [12] above.

35. Section 38(1A) does not—and could not—operate to change the fact that the documents sought are exempt under s 38(1).
36. Under s 55L of the FOI Act, I have no power to decide that exempt documents should be disclosed to the applicant. And under s 11A(4) of the FOI Act, the Department is not required to give the applicant access to those exempt documents.

## **Decision**

37. Under s 55K of the FOI Act, I affirm the Department's decision of 21 January 2011.

James Popple  
Freedom of Information Commissioner  
15 June 2011

## **Review rights**

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.