Civil and Administrative Tribunal

New South Wales

Case Name:	Bennison v NSW Department of Premier and Cabinet
Medium Neutral Citation:	[2016] NSWCATAD 101
Hearing Date(s):	18 May 2016
Date of Orders:	23 May 2016
Decision Date:	23 May 2016
Before:	S Montgomery, Senior Member
Decision:	1. The decision under review is affirmed. insofar as it relates to Records 1-4, and 6-63. 2. The matter is listed for further directions on Tuesday 24 May 2016 at 10 am
Catchwords:	Government information - access - Cabinet information - reasonable grounds
Legislation Cited:	Civil and Administrative Tribunal Act 2013; Government Information (Public Access) Act 2009
Cases Cited:	D'Adam v New South Wales Treasury [2014] NSWCATAD 68 D'Adam v New South Wales Treasury [2015] NSWCATAP 61 Kostas v HIA Insurance Services Pty Limited [2010] HCA 32
Category:	Principal judgment
Parties:	Scott Bennison (Applicant) NSW Department of Premier and Cabinet (Respondent)
Representation:	Counsel: B Kaplan (Applicant) A Mitchelmore (Respondent) Solicitors:

Leslie Hargrave Lawyers (Applicant)
Crown Solicitor's Office (Respondent)

File Number(s): 1610124

REASONS FOR DECISION

Background

1 This is an application by Mr Scott Bennison, seeking review of a decision of the Respondent, the New South Wales Department of Premier and Cabinet, made pursuant to section 58(1)(d) of the *Government Information (Public Access) Act* 2009 (NSW) ("the GIPA Act").

2 In 2015 the New South Wales Government engaged KPMG to provide certain advice on local government reform across the State. The Respondent was responsible for instructing KPMG. KMPG was instructed that the documents it was preparing were for submission to Cabinet or were inputs for Cabinet documents.

3 The Respondent commissioned KPMG to prepare the following reports:

a. Business Case and accompanying methodology paper outlining a cost benefit analysis of mergers

b. Options analysis documents that informed the business case

c. Merger proposals and drafts

d. A macro-level report outlining the high-level benefits of mergers, titled "Local Government Reform Mergers - Impact and Analysis"

e. A technical paper outlining the assumptions used to model benefits entitled Outline of Financial Modelling and Assumptions for Local Government Merger

4 In December 2015, the NSW Government announced local government reforms including 35 proposed mergers of local councils.

5 In his access application Mr Bennison ("the Applicant") requested access to the following:

1) Any and all copy(s) of all briefs, file notes, emails and other documents prepared by any minister and/or their representative/employee(s) that was provided to KPMG.

2) Any and all copy(s) of all versions of reports prepared by KPMG including the final report that forms the basis of the document prepared by KPMG 'Local Government Reform Mergers impacts and analysis'.

3) Any and all reports/documents provided by KPMG to Minister(s) and/or their representatives/employee(s) that is considered supporting and/or cooperating evidence in support of the assertion that mergers will produce financial benefits to the Local Government Sector.

4) Copy of all assumptions/qualifications provided to Minister(s) and/or their representatives/employee(s) by KPMG relating to conclusions that form part of the report prepared by KPMG as referred to on page 2 in the report, "Local Government Reform Mergers impacts and analysis".

5) Copy of all file notes, emails and other documents between Minister(s) and/or their representatives/employee(s) with KPMG.

6) With respect to Cabinet meetings, copies of all presentations/documents provided to Minister(s) and in particular any and all documents provided to Ministers for the Cabinet meeting held on or about the 17 December 2015 that formed the basis for the merger recommendations that were announced on December 18 2015 by the Premier and Minister for Local Government, Paul Toole.

6 In response to the access application the Respondent identified 109 documents which, according to the Respondent, fell within the scope of paragraphs 2 and 6 of the Access Application. The documents were identified in a schedule to the determination and each was allocated a number from 1 to 109. The Respondent determined that it did not hold some of the information that was requested. In regard to the information which it holds, the Respondent determined to release some of the information requested and to refuse access to other information on the basis that there is an overriding public interest against disclosure of that information.

7 The Respondent has not released the information in records 1-63 and records 100-109 on the basis that the information is "Cabinet information" within the meaning of clause 2(1) of Schedule 1 to the GIPA Act. The Applicant indicated that he only seeks access to the documents numbered 1-4, and 6-63. The Respondent agreed to provide access to the documents numbered 5, 84 and 99.

8 The matter was listed for urgent hearing in relation to those documents which the Respondent asserts contain is "Cabinet information". The remaining aspects of the determination are to be the subject of further hearing in the Tribunal at a time yet to be determined.

9 The parties are in general agreement with respect to the applicable provisions in the GIPA Act. These have been considered in numerous decisions of this Tribunal. Senior Member Walker considered the Cabinet Information provisions in *D'Adam v New South Wales Treasury* [2014] NSWCATAD 68 and he also summarised the other relevant GIPA Act provisions.

10 The objects of the GIPA Act as set out in section 3(1) are to advance the system of responsible and representative democratic government by authorizing and encouraging public release of government information by agencies, giving the public an enforceable right to access government information and providing that such access is restricted only when there is an overriding public interest against disclosure.

11 The term "government information" is given a wide meaning by section 4, being defined as "information contained in a record held by an agency". The GIPA Act's focus is on "information", rather than the narrower concept of "documents" which was the focus of the previous legislation. "Agency" is also defined in section 4 and includes "(a) a Government Department". It is not disputed that the Respondent is such a department and therefore an agency to which the legislation applies.

12 The GIPA Act establishes a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure: section 5. Applicants for access to government information have a legally enforceable right to be provided with access to it, unless there is an overriding

public interest against disclosure: section 9. The GIPA Act overrides other statutory provisions that prohibit disclosure, apart from the "overriding secrecy laws" set out in schedule 1. In the case of those laws it is conclusively presumed that there is an overriding public interest against disclosure: sections 11 and 14.

13 With respect to government information not covered by overriding secrecy laws, the GIPA Act establishes a principle that there is a public interest in favour of disclosure: section 12(1). The category of public interest considerations in favour of disclosure is not limited: section 12(2). That subsection then sets out several examples of public interest considerations in favour of disclosure.

14 There can be an overriding public interest against disclosure only when the public interest test in section 13 is satisfied. It provides that "There is an overriding public interest against disclosure of the government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure".

15 In considering whether there is an overriding public interest against disclosure, the Tribunal is to be guided by section 15, which provides that agencies must exercise their functions so as to promote the objects of the GIPA Act and must have regard to any relevant guidelines issued by the Information Commissioner.

16 Clause 2 of schedule 1, however, establishes a conclusive presumption of an overriding public interest against disclosure of Cabinet information. Clause 2 provides:

> 2 Cabinet information
>
> (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as "Cabinet information") contained in any of the following documents:
>
> (a) a document that contains an official record of Cabinet,
>
> (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),

(c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),

(d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,

(e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,

(f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)-(e).

(2) Information contained in a document is not Cabinet information if:

(a) public disclosure of the document has been approved by the Premier or Cabinet, or

(b) 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).

(4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination, or

(b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.

(5) In this clause, "Cabinet" includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

17 Section 106 of the GIPA Act provides a special procedure for decisions by the Tribunal in respect of Cabinet and Executive Council information, as follows:

106 Decisions about Cabinet and Executive Council information

(1) On an NCAT administrative review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information (as described in Schedule 1), NCAT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.

(2) If NCAT is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it.

(3) If NCAT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, NCAT is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter.

(4) NCAT is not to reject the claim unless it has given the Premier a reasonable opportunity to appear and be heard in relation to the matter.

(5) The Premier is a party to any proceedings on an application under this section.

The approach to be taken by the Tribunal

18 Each of the parties has provided written submissions and they are in general agreement in regard to the approach to be taken by the Tribunal. As the Respondent has noted, the procedure established by section 106 of the GIPA Act with respect to Cabinet information was recognised by the Appeal Panel in *D'Adam v New South Wales Treasury* [2015] NSWCATAP 61 at [11]-[12]. At first instance, at paragraphs [45] to [47], Senior Member Walker explained the operation of section 106 as follows:

> "45 No doubt in recognition of Cabinet's role and functioning as a collective, indirectly elected executive branch of government, s 106 establishes a special and very different decision-making matrix for claims to the Cabinet information presumption. Not only is the tribunal "limited to deciding whether there were reasonable grounds for the agency's claim", but it is explicitly "not authorised to make a decision as to the correct and preferable decision on the matter" (s 106(1)). The tribunal's task is thus not to investigate the claim de novo or to engage in normal merits review. Its function is more analogous to that of a court undertaking judicial review.
>
> 46 In performing this limited task, the tribunal is to give the words "reasonable grounds" their ordinary meaning. In *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, 445, three members of the High Court pointed out that the phrase is not synonymous with "not irrational, absurd or ridiculous". "Of course, absurd, and irrational or ridiculous grounds are not reasonable grounds. But the words "reasonable grounds" do not denote grounds which are "not irrational, absurd or ridiculous". The statutory words are to be given their ordinary meaning. It will seldom be helpful, and it will often be misleading, to adopt some paraphrase of them".
>
> 47 The respondent bears the onus of establishing that it had reasonable grounds for the claim (s 105(1)) and it must do so on the balance (meaning preponderance) of probabilities: *Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143, [65][2004] FCA 143; , 208 ALR 73, 86."

19 I agree with that assessment. Accordingly, pursuant to section 106, with respect to documents the Respondent has identified as containing Cabinet Information the Tribunal is limited to deciding whether there are reasonable grounds for the claim and is not authorised to make a decision as to the correct and preferable decision.

20 If, on the basis of the Respondent's evidence and submissions, the Tribunal is not satisfied that the Respondent had reasonable grounds for its claim in relation to any particular document, the Tribunal may review the document in accordance with section 106(2).

21 There was some discussion in regard to the approach to be taken to that second stage of the process. The discussion concerned whether or not the Respondent could adduce further evidence at that stage and whether the Applicant's legal advisors would be permitted to attend a confidential hearing during which the Tribunal reviewed documents in accordance with section 106(2). For the reasons which will become apparent it is not necessary that I determine those issues.

22 The Tribunal is not bound by the rules of evidence and is to act with as little formality as the circumstances permit to appropriately determine matters without regard to technicalities or legal forms. The restrictions imposed by the *Evidence Act* do not apply and hearsay evidence is permissible because in particular sections 59, 60 and 91 of the *Evidence Act* 1995 are not applicable: section 38 of the *Civil and Administrative Tribunal Act* 2013 ("the NCAT Act"). Section 38 provides:

> 38 Procedure of Tribunal generally
>
> (1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.
>
> (2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.
>
> (3) Despite subsection (2):
>
> (a) the Tribunal must observe the rules of evidence in:
>
> (i) proceedings in exercise of its enforcement jurisdiction, and
>
> (ii) proceedings for the imposition by the Tribunal of a civil penalty in exercise of its general jurisdiction, and
>
> (b) section 128 (Privilege in respect of self-incrimination in other proceedings) of the Evidence Act 1995 is taken to apply to evidence given in proceedings in the Tribunal even when the Tribunal is not required to apply the rules of evidence in those proceedings.
>
> Note : Section 67 also prevents the compulsory disclosure of certain documents in proceedings in the Tribunal that would, in proceedings before a court, be protected from disclosure by reason of a claim of privilege.

(4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

(5) The Tribunal is to take such measures as are reasonably practicable:

(a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and

(b) if requested to do so-to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and

(c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

(6) The Tribunal:

(a) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, and

(b) may require evidence or argument to be presented orally or in writing, and

(c) in the case of a hearing-may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.

23 The approach to be taken by the Tribunal as provided for in section 38 of the NCAT Act is the same as that discussed by the High Court in relation to the former Consumer, Trader and Tenancy Tribunal of New South Wales in *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32 at [15]- [17] some citations omitted:

> "The Tribunal may, subject to the [*Consumer, Trader and Tenancy Tribunal Act* 2001], determine its own procedure. It is not bound by the rules of evidence and may inquire into, and inform itself on, any matter in such manner as it thinks fit, subject to the rules of procedural fairness. That freedom is enjoyed by many administrative tribunals. The term "rules of evidence" does not lay out with precision its metes and bounds. Nor does it exclude the discretionary application of such rules. But the authority of the Tribunal to "inform itself on any matter in such manner as it thinks fit" indicates that it is able to act upon information whether or not it is embodied in evidence which would be admissible in a court of law.
>
> There are qualifications upon the Tribunal's procedural freedom. One, which is explicit, is the requirement to observe procedural fairness. The Tribunal's modus operandi must also serve its function, which, in this case, was to hear and determine a building claim. That function implies a rational process of decision-making according to law. A decision based on no information at all, or based on findings of fact which are not open on information before the Tribunal, is not compatible with a rational process.
>
> The exercise of the Tribunal's freedom from the rules of evidence should be subject to the cautionary observation of Evatt J in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [(1933) 50 CLR 228 at 256] that

those rules "represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth". It is a method not to be set aside in favour of methods of inquiry which necessarily advantage one party and disadvantage another. On the other hand, that caution is not a mandate for allowing the rules of evidence, excluded by statute, to "creep back through a domestic procedural rule" [*Re Pochi and Minister for Immigration and Ethnic Affairs* [1979] AATA 64; (1979) 2 ALD 33 at 41 per Brennan J.].

The Tribunal is required to act as expeditiously as is practicable. A member may, in any proceedings, give procedural directions including directions that, in the opinion of the member, will enable costs to be reduced and will help to achieve a prompt hearing of the matters in issue between the parties in the proceedings. It was not in dispute that this power would enable the Tribunal to hear and determine, as it did in this case, a particular issue where such determination is likely to expedite the proceedings."

The Material Before The Tribunal

24 Each of the parties has filed written submissions. The Applicant relies on his own affidavit sworn on 17 May 2016.

25 As noted, the Respondent bears the onus of establishing that it had reasonable grounds for its claim. It relies on the evidence of its General Counsel, Mr Paul Miller who provided affidavit evidence and also appeared at the hearing and was cross examined. Mr Miller's knowledge and experience is clearly relevant to the matter. He stated that:

- he has direct experience and knowledge of Cabinet and its processes as the Department is responsible for the provision of secretariat services to the NSW Cabinet.
- he has overall responsibility for the provision of secretariat services to Cabinet.
- he provides advice on legal, administrative and procedural issues relating to the conduct of Cabinet meetings and the handling of Cabinet records.
- he also provides advice to the Premier for his use in Cabinet and has been responsible for the drafting of numerous Cabinet submissions for the Premier's submission to Cabinet, and the drafting of Cabinet decisions.
- he has also attended Cabinet as Secretary to Cabinet in the absence of the Cabinet Secretary.
- he has attended various meetings of a number of Cabinet Committees, including Cabinet Standing Committees on Legislation, the Budget and Public Administration.

26 In relation to the information in issue in these proceedings Mr Miller stated that he sought information from other employees of the Respondent. In particular he obtained information from Mr Dennis Smith, Solicitor in the Respondent's

Local Government Reform Division, and Ms Eleanor Ritchie, Acting Director in the Respondent's Office of General Counsel.

27 In cross-examination he conceded that he relied on the information that he was given by Mr Smith and Ms Ritchie where he did not have direct knowledge of relevant issues.

28 He also stated that he sought information from Ms Corrine Moffatt in regard to the question of whether the Minister had considered the relevant options and whether Options Analysis documents had been provided to the Minister.

29 Neither Mr Smith, Ms Ritchie nor Ms Moffatt provided evidence in the proceedings. The advice that they gave to Mr Miller is therefore hearsay and cannot be tested.

30 Nevertheless, in the circumstances, I accept Mr Miller's evidence notwithstanding that some of that evidence is hearsay and cannot be tested.

Discussion

Mr Miller's evidence

31 Mr Miller provided an outline of the Cabinet and Cabinet processes. He summarised the process as including many stages:

> Cabinet involves a pattern of deliberations which forms the process by which the Government makes decisions on major policy issues. It may include the processes under which a Cabinet submission ("Submission") is prepared by an agency for a Minister to submit to Cabinet, the lodgement of the Submission by a Minister to the Cabinet Secretariat, the circulation of the Submission to Ministers for consideration and advice, and the provision of advice on the Submission either to all Ministers or to a particular Minister for use in Cabinet. A Cabinet meeting at which a Cabinet decision is formally taken and recorded may be the culmination of this deliberative process, but the term Cabinet refers to a process that is broader than that particular meeting.
>
> ...
>
> Decisions of Cabinet are based upon advice it receives from Ministers, government officers and in some cases external consultants. Usually, the main piece of advice to Cabinet is in the form of a Cabinet Submission. A Cabinet Submission is a submission made to Cabinet or a Committee of Cabinet by the Minister responsible for the subject discussed in the Submission. It constitutes the submitting Minister's principal communication with Cabinet to assist its deliberations on the matters before it. The Submission reflects that Minister's views or opinion on the issue he/she presents to Cabinet. A Cabinet Submission is usually prepared by government officers but it is approved and signed by the Minister and represents the Minister's position. In some cases

copies of external consultant's reports are annexed to a Cabinet Submission. Cabinet relies significantly on the advice and information it receives from Ministers, government officers and, on occasion, external consultants to make its decisions. As such it is vital to the development of public policy and to the good administration of the affairs of the State that Cabinet be able to receive confidential advice and information on the matters that come before it for consideration. In order to achieve this, it is necessary that Cabinet and its Ministers be able to be confident that advice and information which Ministers put before Cabinet and advice they receive from government officers or external experts will remain confidential. It is also necessary to ensure that the persons preparing the advice for Cabinet and Ministers are confident that any advice and views they seek from other Departmental officers or from external experts will remain confidential.

32 Mr Miller expressed the view that it is vital to the development of public policy and the good administration of the affairs of the State that:

a. Ministers in Cabinet are able to have a free and candid discussion on issues that come before it for determination;

b. Ministers and Cabinet are able to obtain full and frank advice from government officers and external experts on issues that come before a Cabinet for determination;

c. Those advising the Ministers and Cabinet are able to obtain full and frank advice and views of other government officers and external experts on matters in respect of which they are providing advice to a Cabinet.

33 Mr Miller identified the information that was captured by the Applicant's GIPA access application which the Respondent asserts is Cabinet Information for the purposes of Clause 2 of Schedule 1 to the GIPA Act.

34 He conceded that he did not read the documents that are in issue for the purposes of these proceedings but said that he may have done so in the context of other litigation. For these proceedings he looked at the documents and scanned their contents. He is aware of the progeny of the documents and the circumstances in which they were prepared and said that he is therefore able to confirm that they contain Cabinet Information.

35 He considers that the disclosure or threat of disclosure of documents that contain this information will adversely affect the proceedings of Cabinet and the quality of the advice given to Cabinet and will therefore inhibit Cabinet's decision-making process. Further, he considers that the disclosure of the information that is within the scope of the present GIPA application would tend to mute and impede the advice given to Cabinet and mute and impede the discussions and deliberations of Cabinet on future matters, including unrelated