OFFICE OF THE INFORMATION COMMISSIONER (QLD)	**)** **)**	S 163 of 1993 (Decision No. 94011)

Participants:

QUINTON NIVEN YOUNG
Applicant

- and -

WORKERS' COMPENSATION BOARD OF QUEENSLAND
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access to one document on the applicant's workers' compensation claim file - application for review lodged outside the time limit stipulated in s.73(1)(d)(i) of the *Freedom of Information Act 1992 Qld* - considerations relevant to the exercise of the discretion conferred by s.73(1)(d) of the *Freedom of Information Act 1992 Qld* to allow a longer period for the making of an application for review - consideration of the merits of the substantive application for review - document in issue clearly exempt under s.42(1)(b) of the *Freedom of Information Act 1992 Qld* - extension of time refused.

Freedom of Information Act 1992 Qld s.34(2)(i), s.42(1)(b), s.52, s.73(1)(d), s.73(1)(d)(i), s.81
Freedom of Information Act 1982 Cth s.37(1)(b)
Administrative Appeals Tribunal Act 1975 Cth s.29(7)
Administrative Appeals Tribunal Act 1984 Vic s.31(2)
Administrative Decisions (Judicial Review) Act 1977 Cth s.11, s.11(1)(c)
Judicial Review Act 1991 Qld s.26(1)
Workers' Compensation Act 1990 Qld

Bell and Australian Telecommunications Commission, Re (1983) 5 ALN N186
Bonavia and Secretary, Department of Social Security, Re (1985) 9 ALD 97
CSIRO and Barbara, Re (1987) 11 ALD 447, 6 AAR 300
Hickey v Australia Telecommunications Commission (1983) 47 ALR 517
Hoffman v Queensland Local Government Superannuation Board QLR, 26 February 1994
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344
Johnson and the Commonwealth, Re (Commonwealth AAT, 5 January 1990, unreported)
Kuku Djungan Aboriginal Corporation v Christensen [1993] 2 Qd R 663
Lucic v Nolan and Others (1982) 45 ALR 411
McEniery and the Medical Board of Queensland, Re (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported)
Pell and Raffles and Bingo Permits Board, Re (1989) 3 VAR 164
Vella and Crimes Compensation Tribunal, Re (1985) 1 VAR 65
Wedesweiller v Cole (1983) 47 ALR 528

DECISION

I decline to exercise the discretion conferred by s.73(1)(d) of the *Freedom of Information Act 1992 Qld* to allow a longer period of time for the applicant to make an application for review of the decision made on 2 February 1993 by Mr Peter Roche, on behalf of the respondent, refusing access to folio 67 of the applicant's workers' compensation claim file.

Date of Decision: 24 June 1994

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F N ALBIETZ
INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

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REASONS FOR DECISION

Background

1. The applicant, through his lawyers (the firm of Gilshenan and Luton), seeks review of the respondent's decision to refuse him access to one document on the workers' compensation claim file held by the respondent in respect of the applicant. The document in issue is claimed by the respondent to be an exempt document under s.42(1)(b) of the *Freedom of Information Act 1992 Qld* (referred to in these reasons for decision as the FOI Act or the Queensland FOI Act). As the application for review has been made well outside the 60 day time limit stipulated in s.73(1)(d)(i) of the FOI Act, it is necessary that I consider the exercise of the discretion conferred on me by s.73(1)(d) of the FOI Act to allow a longer period for making an application for review.

2. The applicant's lawyers first wrote to the respondent on 29 December 1992 in the following terms:

> *We act on behalf of Quinton Niven Young and have instructions to obtain from the Board copies of all documentation in connection with Mr Young's application for Workers' Compensation ... .*
>
> *Accordingly we request that you provide to us all relevant documentation, including the documentation referred to in the General Medical Assessment Tribunal's determination of 24 November 1992.*
>
> *To the extent that copies of the documents can be provided without resort to the* Freedom of Information Act *we so request (see Section 14 of the* Freedom of Information Act*). To the extent that the documents cannot be so provided Mr Young hereby applies for the balance of the documents pursuant to Section 25 of the said Act.*

3. The respondent allowed the applicant access to his workers' compensation claim file, apart from one folio (folio 67) which was claimed to be exempt under s.42(1)(b) of the FOI Act on the basis that its release could reasonably be expected to enable the existence or identity of a confidential source of information in relation to the enforcement or administration of the law to be ascertained.

4. By letter dated 29 January 1993, the applicant's lawyers applied, on the applicant's behalf, for internal review under s.52 of the FOI Act of the decision to refuse access to folio 67. The decision on internal review was made on 2 February 1993 by Mr Peter Roche, who affirmed the respondent's initial decision.

5. The respondent's letter of 13 January 1993 to the applicant's lawyers, notifying the respondent's initial decision, also contained information as to the rights of review conferred by the FOI Act, and

the time limits for exercising them (as required by s.34(2)(i) of the FOI Act). However, it was not until 20 August 1993, some 6½ months after the respondent's internal review decision was given, that the applicant's lawyers despatched a letter applying under s.73(1) of the FOI Act for an external review of the respondent's decision to refuse access to folio 67. That letter was in fact despatched to the Director of the Freedom of Information Division of the Department of Justice & Attorney-General, rather than to my office, but it was promptly forwarded on to me.

6. Receipt of the application for review was acknowledged in a letter dated 27 August 1993 from my office to the applicant's lawyers which was in the following terms:

> *I acknowledge receipt of your application, dated 20 August 1993, for review of the above decision.*
>
> *The decision of which your client seeks review was contained in a letter from the decision-maker dated 2 February 1993 which was received by your firm on your client's behalf on 4 February 1993. The application for review has therefore been lodged more than four months outside the time limit stipulated for an application of this nature by s.73(1)(d)(i) of the* Freedom of Information Act 1992 (Qld) *(the FOI Act). It will be necessary therefore, for your client to apply for an extension of time in which to make the application for review, providing any explanation or excuse for the failure to meet the statutory time limit.*
>
> *The Information Commissioner is generally disinclined to exercise the discretion to grant an extension of time under s.73(1) of the FOI Act where an application for review is without merit (in the sense that it lacks any grounds of substance for challenging the decision under review) or where the respondent or third parties would suffer substantial prejudice by permitting a late application to proceed. Your application for an extension of time should therefore address these issues to the extent that you are able (not having access to the exempt matter which is in dispute). Please note that the respondent has provided me with a copy of the document to which your client has been refused access. My preliminary assessment is that it clearly comprises matter which, if disclosed, could reasonably be expected to enable the existence or identity of a confidential source of information in relation to the enforcement or administration of the* Workers' Compensation Act 1990 Qld *to be ascertained.*
>
> *Please forward your client's application for extension of time, and supporting submission, within 28 days of the date of this letter.*

7. The applicant's lawyers responded by letter dated 2 September 1993, which relevantly stated:

> *At the time notice of the decision maker's review was received by our firm, the facts and circumstances available to our firm led us to believe that the document in question was not required for the successful prosecution of our client's case.*
>
> *Since then, certain matters have come to our attention which have caused us to review our position in relation to this document.*
>
> *We have commenced proceedings against our client's employer and we understand that defence of the action is being conducted by the Workers' Compensation Board. There is no suggestion, in any material before us, that the Defendant could claim privilege in relation to the document in question should we make an application for discovery. That being the case, it would seem more appropriate to allow access to*

the document at this stage, and with minimal cost, rather than require our client to obtain access to the document through the more formal, and expensive, channels of discovery and inspection.

Without seeing the document in question, we are unable to conceive of any disadvantage which the Workers' Compensation Board may suffer as a result of this document's disclosure.

8. On 9 September 1993, I wrote back to the applicant's lawyers in the following terms:

I acknowledge receipt of your letter dated 2 September 1993.

That letter does not amount to an application for an extension of time under s.73 of the Freedom of Information Act 1992 (Qld) *(the FOI Act) so much as a suggestion that it will be more expedient for the Workers' Compensation Board (the Board) to release a copy of the document to you rather than deal with an application for discovery in court proceedings.*

Although there may be some overlap between the grounds of privilege from discovery in court proceedings, and some of the grounds for exemption in Part 3, Division 2 of the FOI Act, the question of whether or not a document would be discoverable in court proceedings is irrelevant to the issue which I would have to determine in an application to review the above decision under Part 5 of the FOI Act. I should draw to your attention the fact that while an agency may have a discretion under s.28(1) or s.14 of the FOI Act to release a document that is technically an exempt document, s.88(2) of the FOI Act makes it quite clear that the Information Commissioner possesses no such discretion in a review under Part 5 of the FOI Act.

I am prepared to pass on to the Board your letter of 2 September 1993 in case it may influence the Board to exercise the discretions which it possesses under s.28(1) and s.14 of the FOI Act. In the event that the Board is not willing to release a copy of the document to you, however, the position is that you have put nothing to me in your letter of 2 September 1993 that would affect my preliminary assessment (conveyed to you in my letter of 27 August 1993) that the document in issue is exempt under s.42(1)(b) of the FOI Act.

If the Board declines to exercise its discretion to release a copy of the document to you, you may wish to consider whether the more sensible course of action would be to withdraw your application for review by the Information Commissioner and pursue an application for discovery in court proceedings. If you wish to put anything further to me on the issue of why I should grant your client an extension of time, please do so by ***Friday, 17 September 1993.***

Nothing further was put to me by the applicant's lawyers in response to the invitation contained in the last sentence of the letter just quoted.

9. I also wrote to the respondent enclosing for its reference a copy of the letter dated 2 September 1993 from the applicant's lawyers, and my response dated 9 September 1993. I asked the respondent to advise me whether or not the matters raised in the letter of 2 September 1993 from the applicant's lawyers persuaded it to release to the applicant a copy of the document in issue. On 20 September 1993, I received a response from Mr P Roche, on behalf of the respondent, in the following terms:

The matters raised by the applicant's solicitors, Gilshenan & Luton, in their letter of 2 September 1993 do not persuade me to release a copy of the exempted document.

I confirm my opinion that the release of the document could reasonably be expected to enable the existence or identity of a confidential source of information in relation to the enforcement or administration of the law to be ascertained.

Considerations Relevant to the Grant of an Extension of Time

10. Section 73(1)(d) of the FOI Act relevantly provides that:

> ***73.(1)*** *An application for review must -*
>
> ...
>
> *(d) be made -*
>
> *(i) within 60 days;*
>
> ...
>
> *from the day on which written notice of the decision is given to the applicant, or within such longer period as the Commissioner allows (whether before or after the end of that period).*

11. The words employed to confer the discretion to extend time for lodging an application for review under Part 5 of the FOI Act are very similar to those used in comparable statutory provisions to confer on a review authority a discretion to extend a stipulated statutory time limit for seeking review; for example:

(a) section 11(1)(c) of the *Administrative Decisions (Judicial Review) Act 1977 Cth* (the ADJR Act) relevantly provides as follows:

> *11.(1) An application to the Court for an order of review -*
>
> ...
>
> *(c) shall be lodged with a Registry of the Court and ... shall be so lodged within the prescribed period or within such further time as the Court (whether before or after the expiration of the prescribed period) allows.*

(b) section 26(1) of the *Judicial Review Act 1991 Qld* relevantly provides as follows:

> *26.(1) An application to the Court for a statutory order of review ... must be made within -*
>
> *(a) the period required by subsection (2); or*
> *(b) such further time as the Court (whether before or after the end of that required period) allows.*

(c) section 29(7) of the *Administrative Appeals Tribunal Act 1975 Cth* (the Commonwealth

AAT Act) provides as follows:

> *(7) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision (including a decision made before the commencement of this section).*

(d) section 31(2) of the *Administrative Appeals Tribunal Act 1984 Vic* (The Victorian AAT Act) provides as follows:

> *(2) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision, whether or not that time has expired.*

The characteristic which is common to each of the five statutory provisions set out above is that the legislature has not prescribed any criteria which are to govern the exercise of the discretion conferred.

12. A substantial number of decisions of the Federal Court of Australia, the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT), and the Victorian Administrative Appeals Tribunal (the Victorian AAT) have discussed the proper approach to the exercise of a discretion to extend the time for making an application for review of an administrative decision. A general consensus seems to have emerged as to appropriate principles which should guide the exercise of a discretion of this kind. Both the Commonwealth AAT and the Victorian AAT, and more recently the Queensland Supreme Court, have followed the principles endorsed by judges of the Federal Court of Australia (in particular those summarised in the case of *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 which is discussed at paragraph 16 below) as being appropriate to guide the exercise of the discretion conferred by s.11(1)(c) of the ADJR Act. I consider it appropriate that I should also be guided by those principles when exercising the discretion conferred on me by s.73(1)(d) of the FOI Act to extend the time for making an application for review under Part 5 of the FOI Act. I do not propose to exhaustively review the decided cases from other jurisdictions, but I do propose to refer to some passages from them which highlight principles deserving of emphasis.

13. In *Lucic v Nolan and Others* (1982) 45 ALR 411, Fitzgerald J, sitting as a judge of the Federal Court of Australia, dealt with an application for extension of time under s.11 of the ADJR Act. Fitzgerald J said (at p.416-7):

> *I do not think that the court, in exercising its power to make exceptions* [to the statutory time limit] *in appropriate cases should confine its attention to the consequences to the applicant of a refusal to extend time. Justice, as the ultimate object to be obtained by the exercise of the discretion, seems to me to require that regard be had to broader considerations than merely the interests of the applicant. Further, whilst there will be some matters which are relevant to the question whether time should be extended (in ordinary litigation* inter partes*) which are also relevant in this context, it seems to me likely that the overlap is only partial and that different emphasis is appropriate to some of the common factors. It may be that exceptional circumstances need not always be shown before time can be extended. However, I consider that an applicant for an extension of time maintains throughout the burden of showing why, in all the circumstances, the extension of time should be granted. I do not think that, given proof of certain matters by an applicant, e.g. an*

> *explanation for his delay in making application, an evidentiary onus shifts to the respondents to establish that prejudice will result if the extension is granted; nor, in my opinion, if the delay is explained and there will be no personal prejudice to the named respondents, should an extension always be granted. All else aside, there will often be no question of prejudice to a respondent decision-maker.*
>
> *It is neither necessary nor desirable, if indeed it would be possible, to enumerate the great variety of possible material circumstances to be considered on an application for an extension of time. Nor, in my opinion, is it possible to identify particular circumstances or classes of circumstances which must automatically be excluded from consideration. Each individual case should be dealt with individually, giving due weight to prior decisions and what they reveal of judicial attitudes ... Whilst there are obvious reasons why there should be no attempt at a full investigation of the merits of the application for review on an application for an extension of time, I would not exclude from consideration in an appropriate case some obvious strength or weakness in an applicant's case ... .*

In refusing the requested extension of time in that case, Fitzgerald J appears to have been most influenced by the failure of the applicant to offer any explanation for the "inordinate and inexcusable delay" which occurred in commencing proceedings.

14. The remarks of Fitzgerald J in *Lucic's* case were endorsed by Lockhart J in *Hickey v Australian Telecommunications Commission* (1983) 47 ALR 517 at p.523 where Lockhart J added the following observations:

> *Although s.11 does not in terms place an onus on an applicant seeking an allowance for further time within which to lodge an application for an order of review, it is nevertheless incumbent upon him to satisfy the court that the extension of time should be granted. It is not for the decision maker to establish that the applicant does not have a case for an extension of time. The applicant seeks an indulgence. It is for him to prove that he is entitled to it. But the court should not surround the exercise of its discretion with unnecessary constraints such as a requirement that there be special circumstances or considerations of that kind. The statute does not require them. Nor should the courts. It is best left to the good sense of the judge hearing each case to determine whether, on the evidence before him, the court's discretion should be exercised in favour of granting an enlargement of time to bring an application for an order of review.*

In that case, Lockhart J refused the application for extension of time, and the factors which carried most weight in influencing that exercise of discretion were the failure of the applicants to explain their delay satisfactorily or at all, and the respondent's evidence which established a real possibility of prejudice to the respondent if the application for an extension of time were to succeed.

15. In *Wedesweiller v Cole* (1983) 47 ALR 528, Sheppard J made the following observations (at p.531) on the scope of the discretion to extend time conferred by s.11 of the ADJR Act:

> *... there will be some cases which may be decided upon considerations which affect only the immediate parties. It will be appropriate to consider whether the delay which has taken place has been satisfactorily explained, the prejudice which may be caused to an applicant by the refusal of an application, the prejudice which may be suffered by the government or a particular department if the application is granted and, generally, what the justice of the case requires. In other cases wider considerations will be involved. In this respect I refer to what was said by Fitzgerald J in* Lucic v Nolan*, at* [45 ALR] *p.416. The discretion is vested in the court in completely unrestricted terms and no indication is given of the matter which the court is to consider. The discretion is therefore a very wide one and I would not wish to say more in case my doing so may have the effect of circumscribing in another case what the facts of that case require.*

16. In *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344, Wilcox J reviewed prior decisions of the Federal Court where the discretion under s.11 of the ADJR Act had been exercised, and distilled the principles set out in the following passage. Those principles have proved highly influential in subsequent cases, not only in the Federal Court but also in the Supreme Court of Queensland, in the Commonwealth AAT and the Victorian AAT, and in other jurisdictions where the exercise of a comparable discretion was in issue. Wilcox J said (at p.348-349):

> *Section 11 of the* Administrative Decisions (Judicial Review) Act *1977 (Cth) does not set out any criteria by reference to which the court's decision to extend time for an application for review under s.5 is to be exercised. Already there have been a number of decisions of judges of this Court, all sitting at first instance, dealing with the approach proper to be taken. They differ a little, both in language and in emphasis, but I venture to suggest that from them may be distilled the following principles to guide, not in any exhaustive manner, the exercise of the court's discretion:*
>
> *1. Although the section does not, in terms, place any onus of proof upon an applicant for extension an application has to be made. Special circumstances need not be shown but the court will not grant the application unless positively satisfied that it is proper so to do. The "prescribed period" of twenty-eight days is not to be ignored (*Ralkon Agricultural Co Pty Ltd v Aboriginal Development Commission *(1982) 43 ALR 535 at 550). Indeed, it is the prima facie rule that proceedings commenced outside that period will not be entertained (*Lucic v Nolan *(1982) 45 ALR 411 at 416). It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an "acceptable explanation of the delay" and that it is "fair and equitable in the circumstances" to extend time (*Duff *at 485;* Chapman v Reilly *unreported (Federal Court of Australia, Neaves J, 9 December 1983) at 7).*
>
> *2. Action taken by the applicant, other than by making an application for review under the Act, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished. A distinction is to be made between the case of a person who, by non-curial means, has continued to make the decision-maker aware that he contests the finality of the decision (who has not "rested on his rights": per Fisher J in* Doyle v Chief of Staff *(1982) 42 ALR 283 at 287) and a case where the decision-maker was allowed to believe that the matter was finally concluded. Compare* Doyle, Chapman, Ralkon and Douglas v Allen *(1984) 1 FCR 287 with* Lucic *at 414-415 and* Hickey v Australian Telecommunications Commission *(1983) 48 ALR 517 at 519. The reasons for this distinction are not only the "need for finality in disputes" (see* Lucic *at 410) but also the "fading from memory" problem referred to in* Wedesweiller v Cole *(1983) 47 ALR 528.*

> *3. Any prejudice to the respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension: see* Doyle *at 287,* Duff *at 484-485,* Hickey *at 525-527 and* Wedesweiller *at 533-534.*
>
> *4. However, the mere absence of prejudice is not enough to justify the grant of an extension:* Douglas, Lucic *at 416,* Hickey *at 523. In this context, public considerations often intrude (*Lucic, Hickey*). A delay which may result, if the application is successful, in the unsettling of other people (*Ralkon *at 550,* Becerra *at 12-13) or of established practices (*Douglas*) is likely to prove fatal to the application.*
>
> *5. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted:* Lucic *at 417,* Chapman *at 6.*
>
> *6. Considerations of fairness as between the applicants and other persons otherwise in a like position are relevant to the manner of exercise of the court's discretion:* Wedesweiller *at 534-535.*

17. In *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at p.665, Moynihan J of the Supreme Court of Queensland, in dealing with an application for extension of time under s.26(1) of the *Judicial Review Act 1991*, approved and applied the principles referred to in the *Hunter Valley Developments* case and in *Lucic v Nolan.* In particular, Moynihan J's consideration of the merits (or lack thereof) of the substantive application appear to have exerted most influence on his decision to refuse the application for extension of time. The principles from the *Hunter Valley Developments* case and *Lucic v Nolan* have also been approved and applied by Thomas J of the Supreme Court of Queensland in *Hoffman v Queensland Local Government Superannuation Board* QLR, 26 February 1994.

18. The principles from the *Hunter Valley Developments* case which are set out at paragraph 16 above have generally been applied by the Commonwealth AAT in the exercise of the discretion conferred by s.29(7) of the Commonwealth AAT Act; see, for example, *Re Bonavia and Secretary, Department of Social Security* (1985) 9 ALD 97; *Re CSIRO and Barbara* (1987) 11 ALD 447, 6 AAR 300. In *Re Bell and Australian Telecommunications Commission* (1983) 5 ALN N186 which was decided prior to *Hunter Valley Developments* but after *Lucic v Nolan,* Deputy President Todd of the Commonwealth AAT expressed misgivings about importing into the proceedings of an administrative tribunal concepts as to burden of proof on an applicant for extension of time (which receive some emphasis in *Lucic v Nolan*) which are more appropriate to court proceedings. At p.N187, Deputy President Todd said:

> *... the authorities cited* [by the respondent] *do not in any way indicate that an application for extension of time under s.29(7) of the Administrative Appeals Tribunal Act 1975 involves any question of onus of proof. The question is rather one of the balance of fairness, having taken into account the various factors impinging upon both sides, including no doubt the question of prejudice. As was said by Reynolds, Hutley and Bowen JJA in* Outboard Marine Australia Pty Ltd v Byrnes: Bauknecht (Third Party) *[1974] 1 NSWLR 27 at 30, cited with approval by the President of the Tribunal in the full Reasons for Decision in* Re Levana Pty Ltd and Minister for the Capital Territory *(1982) 4 ALN No 74 (not reported on this point): "it is also appreciated that where genuine issues ought to be litigated, if such can be done with fairness to all concerned, it is appropriate to take a benign view of*

applications to extend time".

19. In *Re Johnson and the Commonwealth* (Commonwealth AAT, Deputy President Todd, 5 January 1990, unreported) Deputy President Todd repeated his views as to the difficulty in introducing the concept of onus into the proceedings of the Tribunal, however, he went on to endorse the six principles identified in the passage from the *Hunter Valley Developments case* set out at paragraph 16 above, which are careful to state that an applicant for extension of time does not carry a formal onus.

20. The principles from the *Hunter Valley Developments* case have also been embraced by the Victorian AAT, notably by Jones J, the then President of the Victorian AAT, in *Re Pell and Raffles and Bingo Permits Board* (1989) 3 VAR 164 at p.171 where Jones J also endorsed the following passage from an earlier decision of the Victorian AAT in *Re Vella and Crimes Compensation Tribunal* (1985) 1 VAR 65 at 67:

> *There must come a time when delay simpliciter, without any prejudice to the other party, would itself cause the Tribunal to refuse an applicant relief under subs (2). Of necessity there must be some finality in matters of this nature.*

21. On the question of onus, I note that s.81 of the FOI Act provides:

> ***81.*** *On a review by the Commissioner, the agency which or Minister who made the decision under review has the onus of establishing that the decision was justified or that the Commissioner should give a decision adverse to the applicant.*

This provision should not be taken to mean that an agency or Minister carries the onus of establishing, on an application for extension of time under s.73(1)(d), that the Information Commissioner should give a decision adverse to the applicant. I read the opening words of s.81 to mean that the onus provision applies when a review under Part 5 of the FOI Act has commenced, and not when I am considering the exercise of the discretion under s.73(1)(d) to allow an extension of time so as to permit a review to commence. I consider that the principles conveniently summarised in the *Hunter Valley Developments* case (see paragraph 16 above), and those discussed in passages from other cases set out above, should be accepted as affording appropriate guidance to the exercise of the discretion conferred by s.73(1)(d) of the FOI Act.

22. Of those principles, the most significant in the context of a typical FOI dispute where an applicant seeks review of a decision refusing access to documents, are, in my opinion:

(a) the extent of the delay in applying for review and whether the applicant has an acceptable explanation for the delay;

(b) the balance of fairness, having regard to any prejudice that would be occasioned to the applicant by a refusal to grant an extension of time compared with any substantial prejudice that would be occasioned to the respondent or to third parties by the grant of an extension of time; and

(c) the merits of the substantive application for review, i.e. whether it raises genuine issues and discloses a reasonably arguable case, with reasonable prospects of success, in respect of one or more of the documents in issue; or whether it would be futile to permit the application to proceed because it is apparent that the applicant lacks any grounds of substance for challenging the decision under review and has no reasonable prospect of success. (It is a characteristic of these cases that the applicant is not aware of the precise contents of the information in issue.)

Should an Extension of Time be Granted in the Present Case?

23. In the present case, the applicant, through his lawyers, has not provided a compelling explanation for the delay in applying for review. It appears that the applicant's lawyers have belatedly surmised that the document in issue may be of assistance in common law proceedings commenced by the applicant against his employer, and decided to press for access under the FOI Act as an alternative to making an application for discovery in those proceedings. If, however, the document is not privileged from production in legal proceedings, and is otherwise relevant and admissible, the applicant is able to use the well-established court procedures of discovery or subpoena to compel the production of the document for use in those legal proceedings. For that reason, I cannot see any substantial prejudice that would be occasioned to the applicant by a refusal of extension of time. On the other hand, the respondent has informed me that it foresees no prejudice to its interests by the grant of an extension of time. There is no material to suggest that I ought to refuse an extension of time because substantial prejudice would be occasioned to the respondent or to third parties by the grant of an extension of time.

24. Ultimately, however, the factor which has carried predominant weight in the exercise of my discretion under s.73(1)(d) is my consideration of the merits of the substantive application for review. The fact that there is only one document in issue has made consideration of the merits relatively easy. Having examined the document in issue, I am satisfied that the applicant has no reasonable prospects of successfully challenging the respondent's decision that folio 67 of the applicant's workers' compensation claim file is exempt under s.42(1)(b) of the FOI Act.

25. Section 42(1)(b) of the FOI Act provides as follows:

> ***42.(1)*** *Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> ...
>
> *(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained*;

26. A detailed analysis of s.42(1)(b) is set out in my reasons for decision in *Re McEniery and the Medical Board of Queensland* (Information Commissioner Qld, Decision No. 94002, 28 February 1994, unreported). At paragraph 16 of that decision I said:

> *16. Matter will be eligible for exemption under s.42(1)(b) of the FOI Act if the following requirements are satisfied:*
>
> *(a) there exists a confidential source of information;*
>
> *(b) the information which the confidential source has supplied (or is intended to supply) is in relation to the enforcement or administration of the law; and*

(c) disclosure of the matter in issue could reasonably be expected to -

(i) enable the existence of the confidential source of information to be ascertained; or

(ii) enable the identity of the confidential source of information to be ascertained.

27. In the present case, the document in issue comprises information supplied by a confidential source. Indeed the identity of the source is unknown to the respondent, the information having been supplied anonymously. The relevant circumstances compel a finding that the supplier of the information qualifies as a "confidential source of information" according to the test which I endorsed at paragraphs 21 and 22 of my reasons for decision in *Re McEniery*. Given that the source has refused to reveal his or her identity and the respondent has agreed to accept the information on that basis, and having regard in particular to the nature of the information conveyed, I am satisfied that the information was supplied on the express or implied understanding that the identity of the source of information would not be disclosed.

28. The information supplied concerns the applicant's eligibility for workers' compensation payments. In paragraph 36 of my reasons for decision in *Re McEniery*, I referred with approval to a series of cases (including decisions of the Federal Court of Australia) applying s.37(1)(b) of the *Freedom of Information Act 1982 Cth* (which corresponds to s.42(1)(b) of the Queensland FOI Act) in which it has been accepted that information suggesting or alleging that a recipient of social security benefits did not satisfy the eligibility requirements to receive the benefits, was information relating to the enforcement or administration of the law. In my opinion, the same considerations apply equally to information concerning eligibility for receipt of workers' compensation payments under the *Workers' Compensation Act 1990 Qld*. In particular, information supplied to the respondent concerning the possibility that workers' compensation payments have been fraudulently obtained must, in my opinion, be information which relates to the enforcement or administration of the law within the meaning of s.42(1)(b) of the FOI Act. (In so saying, I should make it clear that I am speaking generally and I do not mean to suggest or imply that the applicant has obtained workers' compensation payments improperly.) I am satisfied that the information which the confidential source has supplied is information in relation to the enforcement or administration of the law.

29. Although the information has been supplied anonymously, the nature of the information conveyed is such that its disclosure would enable the applicant to work out the identity of a person who was in a position to observe or obtain information of that nature. Applying the standards referred to in paragraphs 44 and 45 of my reasons for decision in *Re McEniery*, I am satisfied that disclosure of the document in issue could reasonably be expected to enable the identity of the confidential source of information to be ascertained.

30. The three elements of s.42(1)(b) are satisfied. The document, in my opinion, is clearly an exempt document under s.42(1)(b) and the applicant has no reasonable prospect of successfully challenging the decision of which he seeks review under Part 5 of the FOI Act.

Conclusion

31. In these circumstances, I consider it appropriate to decline to exercise my discretion under s.73(1)(d) of the FOI Act to allow a longer period of time for the applicant to make an application for review of the decision made on 2 February 1993 by Mr Peter Roche, on behalf of the respondent, refusing access to folio 67 of the applicant's workers' compensation claim file. The consequence is that the application for review is invalid for failure to comply with s.73(1)(d)(i) of the FOI Act, and will not be dealt with further.

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F N ALBIETZ
INFORMATION COMMISSIONER