

**Sports Drinks Australia Pty Ltd and Department of Tourism, Small Business
and Industry**

(S 170/96, 13 January 1997, Information Commissioner Albietz)

(This decision has been edited to remove merely procedural information and may have been edited to remove personal or otherwise sensitive information.)

1. - 5. [These paragraphs removed.]

REASONS FOR DECISION

Background

6. This is a 'reverse FOI' application by Sport Drinks Australia Pty Ltd, seeking review of the internal review decision dated 2 September 1996, made on behalf of the Department by Mr S. Chapman (Executive Director, Corporate Services), in which Mr Chapman decided to give [the applicant for access] access under the FOI Act to edited versions (i.e., subject to deletion of matter considered by Mr Chapman to be exempt matter under the FOI Act) of the following documents:
 - (a) a letter dated 20 August 1993 addressed to Mr Bob Smith of the Liquor Licensing Division of the Department; and
 - (b) a document headed "Record of Interview" concerning removal of an hotel licence from Bymaroo to Jacobs Well.
7. By letter dated 31 October 1996 (received on that date by facsimile transmission in my office), the applicant lodged an application for external review, under Part 5 of the FOI Act, of Mr Chapman's decision. The applicant was represented by Mr A J Payne, a Director of the applicant.
8. In the body of Mr Chapman's internal review decision, he correctly advised the applicant of the time limit for making an application to the Information Commissioner for external review, namely 28 days from the date on which notice of Mr Chapman's decision was given to the applicant (see s.73(1)(d)(ii) of the FOI Act). In the applicant's facsimile transmission to my office dated 19 November 1996, Mr Payne indicated that it was his understanding that he had 60 days from the date of the internal review decision to seek external review, and referred to an attachment received with the internal review decision, a copy of which was provided to my office. The attachment comprised a standard form detailing the rights of review of agency decisions that are provided for in the FOI Act. This standard form was appropriate for use when conveying information to an applicant for access as to the review rights provided for in the FOI Act, in respect of a decision to refuse access. However, that standard form was liable to be misleading if sent to a person consulted under s.51 of the FOI Act, who was desirous of pursuing a

'reverse FOI' application, since it referred only to a period of 60 days for an applicant to apply to the Information Commissioner. As I have indicated above, since this is a 'reverse FOI' case, the applicant in this case had only 28 days to seek external review, from the date on which notice of the internal review decision was given.

9. In any event, the statutory requirement is such that the applicant's application for external review of Mr Chapman's decision should have been lodged at this office no later than 1 October 1996. The applicant's application for external review was in fact received in this office by facsimile transmission on 31 October 1996, and was therefore 30 days late.

Application of s.73(1)(d) of the FOI Act

10. The result is that I do not have jurisdiction to deal with the applicant's application for external review, unless a successful application for extension of time is made. I have a discretion, under s.73(1)(d) of the FOI Act, to extend the time for making an application for external review. The principles to be applied in respect of such an application are explained in my reasons for decision in *Re Young and Workers' Compensation Board of Qld* (1994) 1 QAR 543. The most significant principles affecting the exercise of the discretion conferred on me by s.73(1)(d) of the FOI Act are set out in paragraph 22 of *Re Young*:

...

- (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 [for access] is not aware of the precise contents of the information in issue.)*

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11. In a letter to the applicant dated 15 November 1996, the Deputy Information Commissioner pointed out to the applicant that the application for external review had been lodged outside the statutory 28 day time limit, and the Deputy Information

Commissioner informed the applicant of my discretion to extend time in accordance with s.73(1)(d) of the FOI Act. The Deputy Information Commissioner provided the applicant with a copy of my decision in *Re Young*, and conveyed to the applicant his preliminary view that, given the nature of the matter which Mr Chapman proposed to release (which, in the view of the Deputy Information Commissioner, was either innocuous, or common knowledge in the relevant industry), an extension of time in which to lodge an application for external review of Mr Chapman's decision was unlikely to succeed.

12. The applicant responded by facsimile transmission dated 19 November 1996. In addition to drawing my attention to the misleading attachment to the internal review decision (concerning review rights), the applicant also submitted that:

As litigation has been commenced in relation to these matters we are requesting that no information be released until we have the opportunity to gain judgment and damages.

13. As to the first principle mentioned in paragraph 22 of *Re Young*, the extent of the delay by the applicant in making the application for external review is not trivial (i.e., it is not a question of missing a statutory deadline by just a few days), but amounts to delay of approximately one month. The applicant has drawn my attention to the possibly confusing way in which the Department informed the applicant of the review rights available under the FOI Act; that is, although Mr Chapman correctly advised, in the body of his internal review decision, of the time in which an application for external review must be made, the attachment to his decision referred to a period of 60 days, which is not the applicable time limit for a 'reverse FOI' application. I accept that this gave rise to some potential for confusion, although a prudent applicant, noting the disparity between the specific advice in the body of Mr Chapman's internal review decision, and the general advice in the attachment to it, should either have resolved to apply for external review within the shorter time limit specifically adverted to by Mr Chapman, or at least sought to clarify the correct time limit by making inquiries of the Department, or by checking the relevant provisions of the FOI Act.
14. As to the second principle described in paragraph 22 of *Re Young*, I accept that there is no prejudice that would be caused to the Department by the grant of an extension of time to the applicant. However, I consider that prejudice would be caused to the applicant for access, given that the effect of Mr Chapman's decision was to find that the applicant for access has a present entitlement to be given access to the two documents in issue (subject to deletion of matter considered by Mr Chapman to be exempt matter under the FOI Act). Since access to documents cannot be given while a 'reverse FOI' application in respect of those documents remains unfinalised, the applicant for access is prejudiced in terms of the delay in obtaining access to those documents.
15. As to the merits of the decision of which the applicant seeks review (the third principle from *Re Young* referred to above), I have reached the view (based on my examination of the documents containing the matter in dispute, the applicant's correspondence to the

Department in relation to the processing of his FOI access application, the initial and internal review decisions made on behalf of the Department, and the applicant's facsimile transmission to my office dated 19 November 1996) that the applicant does not have a reasonably arguable case, with reasonable prospects of success, for review of Mr Chapman's decision.

16. Firstly, in relation to the Record of Interview between Mr Payne and Mr Bob Smith of the Liquor Licensing Division of the Department, it appears to me that the form of the Record of Interview which is proposed for release to the applicant for access, would not disclose any information that could qualify for exemption from disclosure under the FOI Act. It appears from both the initial decision made by Mr Jones on behalf of the Department, and from Mr Chapman's decision, that issues surrounding the application for transfer of the Brymaroo hotel licence were common knowledge within the liquor industry, and were the subject of public hearings before the Licensing Court. The Deputy Information Commissioner specifically referred to this factor in expressing his preliminary views to the applicant, in his letter dated 15 November 1996. The applicant was given the opportunity to comment on this issue, but has not done so. It therefore appears to me that the only matter which Mr Chapman has decided to disclose to the applicant for access, is matter that was the subject of public hearings before the Licensing Court. There is no basis on which this information could qualify for exemption under any of the exemption provisions in Part 3 Division 2 of the FOI Act. I note that matter in the second paragraph of the Record of Interview, which could be expected to be of concern to the applicant, has been claimed by Mr Chapman to be exempt under s.45(1)(c) of the FOI Act, and will not be disclosed by the Department to the applicant for access.
17. In relation to the second document in issue, being the letter to the Department dated 20 August 1993, it appears to me that the form of that document proposed for release by Mr Chapman is entirely innocuous, and could not qualify for exemption under any of the exemption provisions in Part 3, Division 2 of the FOI Act. The document, in the form proposed for release, deletes all the identifying references which could be of concern to the applicant, as well as identifying references to the complainant who wrote the letter to the Department.
18. The applicant (which has had the advantage of seeing the documents in issue in the edited versions in which the Department proposes to grant access) has raised no argument of substance as to how the information, which the Department proposes to disclose under the FOI Act, could qualify for exemption under the FOI Act. The applicant has stated that "litigation has been commenced in relation to these matters", but that, in itself, is immaterial. The FOI Act establishes a self-contained scheme governing access to government-held information, in accordance with applications for access made pursuant to the FOI Act. An applicant for access under the FOI Act has a legally enforceable right to be given access to government-held information which does not fall within the terms of one of the exemption provisions in Part 3 Division 2 of the FOI Act, or one of the other exceptions to the right of access provided for in the FOI Act. The fact that litigation has commenced is irrelevant, unless that in itself is a

material fact sufficient to establish the application of one of the exemption provisions, or one of the other exceptions to the right of access, provided for in the FOI Act itself. I am not aware of any basis on which that could reasonably be contended, and the applicant has not attempted to make out such a contention.

19. In the circumstances, I find that it would be futile to permit the application for review to proceed, as I am satisfied that it has no reasonable prospects of success. I therefore decline to exercise, in favour of the applicant, the discretion conferred on me by s.73(1)(d) of the FOI Act.

Conclusion

20. For the foregoing reasons, 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 internal review decision made on 2 September 1996 by Mr Chapman, on behalf of the Department. The consequence is that the application for external review is invalid for failure to comply with s.73(1)(d)(ii) of the FOI Act, and will not be dealt with further.