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Freedom of information and reviews of deemed refusals by the Administrative Appeals Tribunal

The Federal Court has ruled that the Administrative Appeals Tribunal cannot compel an agency to make a decision relating to access to documents where there has been a deemed refusal.

Bienstein v Attorney-General & Minister for Home Affairs [2009] FCA 1501

In this case, Ms Bienstein made an application under the *Freedom of Information Act 1982* (FOI Act) to access a range of documents held by the Attorney-General and the Minister for Home Affairs (previously Minister for Justice and Customs). The Attorney-General and the Minister were deemed to have declined the request when they failed to respond to Ms Bienstein's application within the 30-day statutory time period.

Ms Bienstein applied to the Administrative Appeals Tribunal to review the deemed decisions to refuse access to the documents. Relevantly, each of the respondents filed a summary of all the evidence detailing the searches conducted. Ms Bienstein considered the respondent's summary inadequate. For various reasons (not presently relevant) the matter proceeded on appeal in 2007 to the Federal Court, where it was ultimately remitted back to the Tribunal for reconsideration.

In this subsequent proceeding, Ms Bienstein sought a direction from the Tribunal to the effect that the Attorney-General and the Minister be required to furnish notices of decision on her requests. In support of the directions sought, Ms Bienstein submitted the following:

- ss 56 and 58 of the FOI Act (dealing with deemed decisions) were merely for the purpose of triggering review rights. In other words, a deemed decision was not meant to replace an agency's obligation to make an actual decision
- on review of a deemed decision the task of the Tribunal was to review the failure of the agency to make a decision. This is so by virtue of s 25(5) of the *Administrative Appeals Tribunal Act 1975*.

The Tribunal refused to direct the Attorney-General and the Minister to issue a statement of reasons to Ms Bienstein on the basis that it lacked the power to do so.

The fundamental issue on appeal to the Federal Court was whether the Tribunal could compel the Attorney-General and the Minister to make an actual decision on Ms Bienstein's requests for documents in circumstances where a deemed decision to refuse access existed.

Decision of the Federal Court

Gray J held that the Administrative Appeals Tribunal did not have the power to compel the Attorney-General and the Minister to make a decision in respect of access to the documents. His Honour found that the purpose of s 56 is to provide a right of review of a deemed decision. Endorsing the view of Beazley J in *Cashman & Partners v Secretary, Department of Human Services and Health* [1995] FCA 1730, his Honour held that, in cases of a deemed decision, the task of the Administrative Appeals Tribunal is no different from its task in the case of an actual decision to refuse access.

The decision of the Federal Court also emphasised the nature of Tribunal reviews when considering deemed refusals. The Court distinguished between two opposing tasks:

- reviewing an agency's failure to make a decision, or
- reviewing an agency's refusal to grant access to documents.

The Court confirmed that the Tribunal was not reviewing an agency's failure to make a decision; rather, the task of the Administrative Appeals Tribunal is to make its own decision and to do so by starting afresh (per *Drake v Minister for Immigration Affairs* (1979) 46 FLR 409).

Implications for clients

The Federal Court's decision clarifies the scope of a review by the Administrative Appeals Tribunal where an agency is deemed to have refused access to documents by virtue of the time limitations contained in the FOI Act.

More information

Text of the decision is available at [Bienenstein v Attorney-General and Minister for Home Affairs \[2009\] FCA 1501](#).

Jane Lye, Senior Executive Lawyer, acted as counsel for the Attorney-General and the Minister for Justice and Customs in this case, with Elena Arduca, Senior Executive Lawyer, instructing.

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