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FEDERAL COURT CLARIFIES LAW ON NOTICES OF DECISIONS UNDER THE FREEDOM OF INFORMATION ACT 1982

In *Secretary, Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442, the Federal Court held that the Secretary could rely on s 26(2) of the *Freedom of Information Act 1982* (FOI Act) in refusing to state whether a document existed, if to do so would cause the notice of the FOI decision to be an exempt document under any of the exemption provisions in the FOI Act.

Background

In two separate requests under the *Freedom of Information Act 1982* (FOI Act) to the Department of Health and Ageing, iNova had sought access to any correspondence received by the Therapeutic Goods Administration (TGA) seeking to register particular generic drugs on the Australian Register of Therapeutic Goods (ARTG) by pharmaceutical companies (other than iNova, whose originator drug was already registered on the ARTG). iNova sought review by the Administrative Appeal's Tribunal (AAT) of the Secretary's decision to refuse access to documents fitting the description of iNova's requests without informing iNova whether or not any such documents were in the Department's possession.

The AAT set aside the reviewable decisions and remitted the matters to the Secretary, with a direction that the Secretary inform iNova whether the documents sought in its requests existed. The AAT had held that there was no power to give a 'neither confirm nor deny response' under s 26(2) of the FOI Act based on the assumption that documents would be exempt and that a 'neither confirm nor deny' response was available under s 25(1) only. The Secretary appealed to the Federal Court.

Issues to consider by the Federal Court

The appeal required the Federal Court to consider whether s 25(1) and s 26(2) of the FOI Act allow an agency or Minister to make a decision not to inform an applicant whether or not documents exist.

(The FOI requests in issue in these proceedings were made prior to the amendments to the FOI Act by the *Freedom of Information Amendment (Reform) Act 2010* (Reform Act) coming into effect. As a result, the Court was considering the FOI Act prior to the amendments made by the Reform Act. The wording of s 25 and s 26(2) of the FOI Act has been substantially unchanged by the Reform Act, with the exception of s 25(1), which removes the reference to the exemption in s 33A.)

Section 25(1) provides that nothing in the FOI Act is taken to require an agency to give information as to the existence or non-existence of a document, if to include that information in a document, would cause such a document to be an exempt document by virtue of s 33, s 33A or s 37 of the FOI Act. Under s 26(2) a notice is not required to contain any matter that if included in a document would have the consequence that that document would be an exempt document.

Federal Court's decision

Emmett J held that the effect of s 11(1) and s 18(1) of the FOI Act means that an applicant has no entitlement to information under the FOI Act, only documents. For this reason, the AAT had gone beyond the scope of its power in purporting to require the decision maker to provide information to the applicant as to whether documents exist.

On the substantive issue of the construction of s 25 and s 26(2) of the FOI Act, Emmett J held that while there may be some overlap between the two provisions, they were essentially directed at different questions. Section 25 is a qualification to the right of access to documents created by s 11 of the FOI Act and the obligation on agencies in s 18 of the FOI Act to give access to documents, whereas s 26(2) is concerned with the giving of notice of a decision and the matters required to be stated in such a notice.

Emmett J held that s 26(2) makes it clear that a non-informative response is authorised in appropriate cases. His Honour noted that this construction would not detract from the objects of the FOI Act, but would promote the protection of information that the Parliament has specifically identified as meriting protection.

As a result, Emmett J held it was open to the Secretary or her delegate, in giving a notice under s 26(1) to decline to state whether a document existed if to do so would cause the notice of the decision to be an exempt document.

Implications

The decision of the Federal Court enables agencies to refuse access to documents and issue a statement of reasons in accordance with s 26 of the FOI Act, without revealing whether any of the documents requested are in its possession if revealing that information would cause the notice to be exempt. This decision is of particular assistance in cases such as this one, where to advise the existence or non-existence of the documents sought will in effect, provide the applicant with the (exempt) information it seeks and where applicants make periodical FOI requests for the same information to see whether the form of the response changes over time.

AGS acted for the Secretary Department of Health and Ageing in both the AAT and the Federal Court proceedings.

or further information please contact:

Justin Davidson
Senior Executive Lawyer
T 02 9581 7472
justin.davidson@ags.gov.au

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