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Court allows appeal against decision upholding public interest immunity (PII) over complaint and investigation records

In [*Ahmet v Chief Commissioner of Police \[2014\] VSCA 265*](#) the Victorian Court of Appeal has allowed an appeal against a decision that upheld public interest immunity (PII) over complaint and investigation records held by the Chief Commissioner of Police (Vic). The decision highlights the importance of ensuring that a PII claim is supported by affidavit evidence that explains the basis for the claim with sufficient particularity.

The County Court's decision

The applicant sought access to files containing records of complaints concerning 4 police officers and the investigation of the complaints. The Chief Commissioner of Victoria Police claimed PII over the files.

The County Court upheld the PII claim. In upholding the claim, the primary judge relied on an affidavit made by a senior police officer in the Professional Standard Command (PSC). The affidavit stated, in general terms, that the ability of Victoria Police to receive and investigate complaints against police officers would potentially be prejudiced if the documents were disclosed. The affidavit said that release of the documents would:

- disclose details of the PSC investigative processes
- discourage the free and frank exchange of information and views essential for proper investigation of complaints
- discourage complainants and police officers from participating in the process.

The primary judge did not inspect the records himself.

The Court of Appeal's decision

The Court of Appeal held that the primary judge erred by failing to inspect the documents and relying on the general statements in the affidavit.

The Court noted that the documents were not covered by a recognised class of PII. Rather, the claim had to be based on the particular contents of the documents. This 'required the Chief Commissioner to identify with some particularity the basis for his contention that the disclosure of the information contained in the subpoenaed documents would harm some aspect of the public interest' ([22]).

The Court found that the affidavit failed to do this. The claim was 'framed in general terms'. The Court said (at [26]):

... the statements [the deponent] makes about the alleged impact of the release of the PSC files and the disciplinary process files do not identify, or articulate in any real meaningful way, what it is about the contents of those files that, if disclosed in the current proceeding, would harm the

public interest in some way. In other words, the statements made in the affidavit and relied upon by the Chief Commissioner are presented at a level of generality which prevents any real assessment of their strength.

By relying on these general statements, not inspecting the documents and ‘forming a view about whether any damage might result from disclosure’, the primary judge had failed to undertake a ‘proper weighing of the merits of the competing claims’ ([28]). The Court said that:

In the absence of his Honour having a good appreciation of the substance of the information that the Chief Commissioner contends is ‘sensitive’ in the public interest and the potential damage that would like result if it were disclosed in the context of the litigation, no proper weighing of the merits of the competing claim could be undertaken.

The Court noted (at [27]) that what is required when deciding each PII claim will depend on the circumstances. But it also expressed its view (at [32]) that ‘where a claim for immunity is a “contents” claim, that exercise will normally require the judge to inspect the documents for the purpose of making a decision on whether or not the claim is made out’.

This view is contrary to existing authority, which provides that the power to inspect documents the subject of a PII claim should be exercised sparingly. For example, it has been said that a court should inspect the documents if it:

- has decided on balance that a document(s) should probably be produced (*Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ; *Conway v Rimmer* [1968] AC 910)
- is unable to decide where the balance of public interest lies (*Burmah Oil Co Ltd v Governor and Company of the Bank of England* [1980] AC 1090; *D v National Society for the Prevention of Cruelty to Children* (1978) AC 171)
- is not persuaded that the claim to immunity can otherwise be properly advanced (*Howe v The State of South Australia & Belperio* (1998) 196 LSJS 182).

Implications for agencies

The decision highlights the need to have detailed and persuasive affidavit evidence in support of a PII claim so that the court can be satisfied of the potential harm to the public interest if disclosure is permitted. A clear and compelling affidavit will reduce the likelihood that the court will consider it necessary to inspect the documents that are the subject of the claim and increase the prospects of a claim being upheld.

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