



Express law fast track information for clients

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Freedom of information and transfer of requests between agencies

The Federal Court on 8 August 2007 ruled on the process required to transfer a freedom of information request between agencies. In doing so, the court provided guidance on the matters which need to be taken into account when considering whether to transfer a request.

Bienstein v Attorney-General (Commonwealth) and Minister for Justice and Customs (Commonwealth) [2007] FCA 1174

The *Freedom of Information Act 1982* (FOI Act) establishes a process for public access to government-held documents.

Section 16(1) of the FOI Act permits an agency to transfer part or the whole of a request for documents to another agency where:

- a) the document is not in the possession of that agency, but, to the knowledge of that agency, it is in the possession of another agency
- b) the subject matter of the document is more closely connected with the functions of another agency.

In this case, the Attorney-General and the Minister for Justice and Customs had each transferred requests to the Attorney-General's Department.

The applicant challenged the validity of both transfers. She also argued that an applicant has a right to insist that the request remain with the agency that received it when the applicant wants to determine whether that agency holds any documents relevant to the request.

The Administrative Appeals Tribunal found that both requests were transferred in accordance with section 16(1)(b) of the FOI Act and that it did not have jurisdiction to review the transfers.

Decision of the Federal Court

On appeal, the Federal Court (Gray J) ruled in favour of the applicant. His Honour set aside the decision of the tribunal and remitted each matter to the tribunal to be heard again on the basis that the transfers were invalid and each gave rise to a deemed refusal to provide documents to the applicant.

His Honour found that section 16(1) of the FOI Act gives an agency a discretion to transfer a request in two alternative circumstances. The relevant test cannot be satisfied and the transfer properly effected in either of those circumstances until the transferring agency has made all necessary searches to locate the document/s in question. Consequently, the transfer of a whole request under section 16(1) of the FOI Act without regard to what documents the transferring agency has will not constitute a valid transfer.

His Honour held that section 16(1)(b) of the FOI Act will only permit a transfer when the transferring agency has the document in question in its possession but can identify another agency with which the document is more closely connected. His Honour reached this conclusion after analysing the terms of section 16(1)(b), the context of other provisions in the FOI Act and the underlying purpose or object of the FOI Act. His Honour found that the tribunal was in error when it found that section 16(1)(b) did not require the Attorney-General or the Minister for Justice and Customs to determine whether the documents sought by the applicant were in their possession before transferring the request.

His Honour found that both transfers were invalid. Consequently, the Attorney-General or the Minister for Justice and Customs remained responsible for the processing of both requests and each was deemed to have refused the request. Accordingly, his Honour found that the tribunal had jurisdiction to review those decisions (section 54 of the FOI Act).

Implications for clients

The Federal Court's decision clarifies the circumstances in which a transfer can be effected. The decision makes it clear that a transfer will not be valid unless the transferring agency can demonstrate that it has conducted proper searches for the documents which are the subject of a proposed transfer.

The decision also emphasises that an agency retains a discretion under section 16(1) of the FOI Act not to transfer a request.

More information

Text of the decision is available at [Bienstein v Attorney-General \[2007\] FCA 1174](#)

Jane Lye, Senior Lawyer, AGS acted as instructing solicitor for the Attorney-General and the Minister for Justice and Customs in this case.

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